United States Court of Appeals for the Second Circuit



APPENDIX

74-1347B

In the United States Court of Appeals for the Second Circuit

No. 74-1347

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

FRANCESCO CORDARO,

Plaintiff-Appellant,

-against-

RICHARD H. LUSARDI and THE UNITED STATES OF AMERICA,

72 Civ. 3644 (MIG)

Defendants and Third-Party Plaintiffs,

-against-

CITY OF POUGHKEEPSIE.

Third-Party Defendant.

Appeal from a Judgment Dismissing Complaint entered in the United States District Court for the Southern District

APPENDIX



MARSHALL L. BRENNER, ESQ.
Attorney for PlaintiffAppellant
Office and P.O. Address
35 Market Street
Poughkeepsie, New York
Tel. (914) 452 2022

PAGINATION AS IN ORIGINAL COPY

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UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

FRANCESCO CORDARO,

Plaintiff.

-against-

RICHARD H. LUSARDI and THE UNITED STATES OF AMERICA,

NOTICE OF APPEAL

Defendants and Third-Party Plaintiffs,

-against-

72 Civ. 3644

CITY OF POUGHKEEPSIE,

Third-Party Defendant.

SIRS:

PLEASE TAKE NOTICE, that the Plaintiff, FRANCESCO CORDARO, hereby appeals to the United States Court of Appeals for the Second Circuit from the Judgment herein filed in the Office of the Clerk of the United States District Court for the Southern District of New York on January 10, 1974, and the said Plaintiff hereby appeals from each and every part of said Judgment as well as the whole thereof.

Dated: Poughkeepsie, New York January 29, 1974

YOURS, ETC.,

MARSHALL L. BRENNER, ESQ. Attorney for Plaintiff Office and P.O. Address 35 Market Street Poughkeepsie, New York 12601 Tel. No. (914) 452-2022

5/

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

FRANCESCO CORDARO.

Plaintiff,

NOTICE OF CROSS-APPEAL

RICHARD H. LUSARDI and UNITED STATES OF AMERICA,

> Defendants and Third-Party Plaintiffs.

.72 Civ. 3644 M.I.G.

-4.

CITY OF POUCHKEEPSIE,

Third-Party Defendent.

SIR:

Notice is hereby given that the defendants and third-party plaintiffs, Richard H. Lusardi and United States of America, hereby appeal to the United States Court of Appeals for the Second Circuit from that part of the Judgment entered by the Clerk of the United States District Court for the Southern District of New York on January 10, 1974 that dismissed the third-party complaint against the City of Poughkeepsie.

Dated: New York, New York

February 8, 1974

PAUL J. CURRAN
United States Attorney for the
Southern District of New York
Attorney for the Defendants and
Third-Party Plaintiffs,
Richard H. Lusardi and
United States of America

By:

Gerald A. Rosenberg

GERALD A. ROSENBERG
Assistant United States Attorney
Office and Post Office Address:
United States Courthouse
Foley Square
New York, New York 10007
Telephone: (212) 264-6328

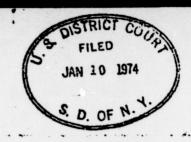
TO:

HON. RAYMOND F. BURGHARDT Clerk, United States District Court Southern District of New York United States Courthouse Foley Square New York, New York 10007

ROBERT B. DIETZ, ESQ.
Corporation Counsel
City of Poughkeepsis
City Hall
Poughkeepsie, New York 12601

MARSHALL L. BRENNER, ESQ. 35 Market Street Poughkeepsie, New York 12601

Clerk United States Court of Appeals for the Second Circuit 17th Fl. New York, NY 10007



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UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

FRANCESCO CORDARO,

Plaintiff,

-against-

72 Civil 3644(MIG)

JUDGMENT

RICHARD H. LUSARDI AND THE UNITED STATES OF AMERICA.

Defendants and Third-Party Plaintiffs,

-against-

CITY OF POUGHKEEPSIE,
Third-Party Defendant.

MICTOFII N JAN 1 0 1974

The Issue of liability in the above entitled action having been brought on regularly for trial before the Honorable Murray I.

Gurfein, United States District Judge, on November 13, 1973, and at the conclusion of the evidence the Court having reserved decision, and the Court thereafter on January 7, 1974, having handed down its opinion, constituting its findings of fact and conclusions of law in favor of the defendants, Richard H. Lusardi and The United States of America, it is,

ORDERED, AADJUDGED AND DECREED, that defendants, RICHARD H.

LUSARDI AND THE UNITED STATES OF AMERICA, have judgment against the
plaintiff, FRANCESCO CORDARO, dismissing the complaint, and it is
further,

ORDERED, that the third-party complaint against the CITY OF POUGHKEEPSIE, be and it hereby is dismissed.

Dated: New York, N. Y.

January 10, 1974

Raymond F. Burghardt

The same of the sa

4

TATE OF NEW YORK

UPREME COURT: COUNTY OF DUTCHESS

RANCESCO CORDARO,

Plaintiff

against

ICHARD H. LUSARDI .D. #1 Box 251A lizaville, New York

Defendant

Index No.

Plaintiff designates

Dutchess

County as the place of trial

The basis of the venue is

Plaintiff's residence

Summons with Notice

Plaintiff resides at 46 Lent Strect Poughkeepsie, New York County of Dutchess

he above named Defendant

Hou are herely summand to answer the complaint in this action and to serve a copy our answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's orney(s) within -30 - days after the service of this summons, exclusive of the day of service (or within 30 days r the service is complete if this summons is not personally delivered to you within the State of New York); and in of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the plaint.

ed. June 14, 1972

ice: The object of this action is negligence

MARSHALL L. BRENNER, ESQ.

Attorney(s) for Plaintiff Office and Post Office Address

35 Market Street Poughkeepsie, New York Tel. No. (914) 452-2022

relief sought is money damages

Upon your failure to appear, judgment will be taken against you by default for the sum of \$ and the costs of this action. with interest from

(a) by delivering thereat, a true copy of each to

a person of suitable age and discretion

(b) by affixing a true copy of each to the door thereof, deponent was unable, with due diligence to find defendant or a person of cuitable age or discretion thereat, having called there

on 19 at P.M. on 19 at P.M.
on 19 at P.M. on 19 at P.M.

deponent also enclosed a copy of same in a postpaid sealed wrapper properly addressed to said defendant at defendant's last known residence, No.

and deposited said wrapper in—a post office—
official depository under the exclusive care and custody of the United States post office department within New York State.

Sworn to before me, this 13
day of 30-4

Ouck

JOAN C. VICK
NOTARY PUBLIC, STATE OF NEW YORK
QUALIFIED IN DITICHESS COUNTY
COMMISSION EXPIRES MARCH 30, 19.24

John D. While

LICENSE NO....

STATE OF NEW YORK SUPREME COURT: COUNTY OF DUTCHESS

FRANCESCO CORDARO,

Plaintiff,

-against-

VERIFIED COMPLAINT

RICHARD H. LUSARDI,

Index NO. 2207/72

Defendant.

The Plaintiff, complaining of the Defendant, shows to the Court and alleges:

- 1. On November 11, 1969, on a public highway called Harrison Street at the intersection with Bement Street, City of Poughkeepsie, State of New York, the Defendant, RICHARD H. LUSARDI was operating a 1968 Chevrolet, the United States Government license number I-95618 with the consent and permission of the owner, the United States Government, and operated said vehicle so negligently as to cause it to run through a stop sign without stopping on Harrison Street and colliding with the 1966 ford automobile operated by the Plaintiff, FRANCESCO CORDARO, with the consent and permission of the owner, PIERINA CORDARO.
- 2. That the right side of the vehicle operated by the Defendant, as aforesaid, collided with and struck the front end of the vehicle operated by the Plaintiff as aforesaid.
- 3. Solely as a result of the negligence of the Defendant and without any negligence on the part of the Plaintiff hereto, the Plaintiff, FRANCESCO CORDARO, was personally injured, all to his damage in the sum of ONE HUNDRED THOUSAND and no/100

(\$100,000.00) DOLLARS.

WHEREFORE, the Plaintiff demands judgment against the Defendant, RICHARD H. LUSARDI, for the sum of ONE HUNDRED THOU-SAND and no/100 (\$100,000.00) DOLLARS, together with the costs and disbursements of this action.

MARSHALL L. BRENNER, ESQ.
Attorney for Plaintiff
Office and P.O. Address
35 Market Street
Poughkeepsie, New York 12601
Tel. No. (914) 452-2022

TO: WHITNEY NORTH SEYMOUR, JR.
United States Attorney
Southern District of New York
United States Courthouse
Foley Square
New York, New York 10007

Verified by Franceso P. Cordaro on September 5, 1972

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FRANCESCO CORDARO,

Plaintiff,

ANSWER

72 Civ. 3644 MIG

UNITED STATES OF AMERICA,

Defendant.:

The defendant, United States of America, by its attorney, Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, for its answer to the complaint, a copy of which is attached hereto and made Exhibit A hereof, responds as follows:

- paragraphs 1 and 2, except admits that on December 7, 1969, at the intersection of Harrison Street and Bement Avenue in the City of Poughkeepsie, New York, the front end of a car driven by the plaintiff struck the right side of a station wagon, driven by Richard H. Lusardi, and owned by his employer, the National Park Service of the Department of the Interior, an agency of the defendant, the United States of America.
 - 2. Denies all the allegations in paragraph 3.

FOR A FIRST AFFIRMATIVE DEFENSE

3. The action is barred because the plaintiff failed to present a timely claim to the Department of the Interior, in accordance with 28 U.S.C. §§ 2401(b) and 2675(a) and 28 C.F.R. §14.2.

FOR A SECOND AFFIRMATIVE DEFENSE

4. Even if the plaintiff's administrative claim was timely, the action was commenced prematurely, inasmuch as the summons was served on July 12, 1972, prior to the receipt by the Department of the Interior on July 17, 1972 of the administrative claim. The Department of the Interior had not denied the claim nor had six months elapsed from the time of its presentation when the suit was begun in State court. 28 U.S.C. \$2675(a).

FOR A THIRD AFFIRMATIVE DEFENSE

5. An agreement dated March 25, 1971, and executed by the plaintiff and an agent of the defendant, United States of America, which provided for an administrative adjustment of plaintiff's claim, in accordance with 28 U.S.C. § 2672, reflected the intention of both parties that the defendant United States of America would pay to plaintiff and plaintiff's insurer a sum of money equal to the property damage to plaintiff's car in consideration for which the plaintiff would be barred from making any further claims for damages allegedly arising out of the subject collision.

FOR A FOURTH AFFIRMATIVE DEFENSE

6. Plaintiff's contributory negligence in his operation of his car immediately prior to and at the time of the collision was the proximate cause of the collision.

FOR A FIFTH AFFIRMATIVE DEFENSE

7. Because of the negligence of the City of Poughkeepsie in the arrangement and placement of its traffic

and parking signs on the north side of Harrison Street just east of Bement Avenue, Richard H. Lusardi was unable to see the stop sign at the intersection of the above-named streets until after he had entered the intersection on November 7, 1969, at the time of the collision. If the collision became unavoidable as a result of Lusardi's having entered the intersection without stopping, Lusardi was not at fault therefor and liability for the injuries resulting therefrom attaches to the agency creating the risk of such injuries, to wit, the City of Poughkeepsie.

Dated: New York, New York February 21, 1973.

WHITNEY NORTH SEYMOUR, Jr.
United States Attorney for the
Southern District of New York
Attorney for the Defendant,
United States of America.

GERALD A. ROSENBERG

Assistant United States Attorney
Office & P.O. Address:
United States Courthouse
Foley Square
New York, New York 10007

Telephone (212) 264-6328

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

FRANCESCO CORDARO,

Plaintiff,

UNITED STATES OF AMERICA.

Civil Action

Defendant.

72 Civ. 3644 MIG

UNITED STATES OF AMERICA,

Third-Party Plaintiffs, :

CITY OF POUGHKEEPSIE,

Third-Party Defendant.

TO THE ABOVE-NAMED THIRD-PARTY DEFENDANT:

You are hereby summoned and required to serve upon Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, plaintiff's attorney whose address is United States Court House, Foley Square, Third Farty -New York, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the third-party complaint.

THOMAS. E ANDREW

Clerk of Court

EADECRER

Deputy Clerk

(Seal of the U. S. District Court)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FRANCESCO CORADARO,

Flaintiff,

UNITED STATES OF AMERICA

Defendant.

UNITED STATES OF AMERICA

Third-Party Plaintiff,

Third-Party Defendant.

Third-Party Defendant.

Jelsel 4/26/73

THIRD-PARTY COMPLAINT

72 Civ. 3644 MIG

Defendant, United States of America, by its attorney, Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, for its third-party complaint, alleges as follows:

- 1. The Court has jurisdiction of this action pursuant to 28 U.S.C. \$61345.
- 2. On December 7, 1969, at the intersection of
 Harrison Street and Bement Avenue in the City of Poughkeepsis,
 New York, the front end of a 1966 Ford automobile bearing
 New York State license plate identification number 1487 FT,
 driven by plaintiff Francesco Cordaro, struck the right
 sids of a 1968 Chevrolet station wagon, bearing United States
 license plate identification number I-95618, driven by
 Richard H. Lusardi, and owned by his employer, the National

Park Service of the Department of the Interior, an agency of the defendant, the United States of America.

- 3. As a result of the collision described above, the plaintiff allegedly suffered personal injuries.
- 4. On July 12, 1972, Richard H. Luserdi was served with a summons issued by the Supreme Court of the State of New York for Dutchess County, naming him as the defendant in a civil action for money damages in which the plaintiff was Francesco Cordaro.
- 5. On August 25, 1972, the United States of
 America, on behalf of Richard H. Lusardi, filed a Petition
 for Removal of the Dutchess County action (described in
 f4, supra) to the United States District Court for the
 Southern District of New York, pursuant to 28 U.S.C.
 f5 1442(a), 1446, and 2679(d). On the same date, a Notice
 of Removal was mailed to the Clark of the Dutchess County
 Supreme Court and to plaintiff's counsel.
- 6. On September 5, 1972, plaintiff Francesco
 Cordaro signed a verified complaint, in which he sought
 damages in the amount of \$100,000.00 from the then defendant
 Richard H. Lusardi as a result of injuries allegedly sustained in the collision described in \$2, supra. A copy of
 the complaint is attached hereto and made exhibit A hereof.
- 7. On September 26, 1972, the then defendant,
 Richard H. Lusardi, filed a motion in federal court to have
 the United States of America substituted en the party-defendant and to dismiss the complaint.

- 8. On February 1, 1973, United States District
 Judge Murray I. Gurfein filed an Opinion, granting the
 motion to the extent of substituting the United States as
 the party-defendant, but denying the motion to dismiss the
 complaint.
- 9. On April 26, 1973, an answer was filed, in which the defendant, United States of America, denied liability and alleged that the negligence of the City of Poughkeepsie in the arrangement and placement of traffic signs at the intersection of Harrison Street and Bement Avenue was a proximate cause of the subject collision. A copy of the answer is attached hereto and made exhibit B hereof.
- 10. If the defendant, United States of America, is held liable for the plaintiff's alleged injuries arising from the subject collision, then the City of Poughkeepsie, because of its negligence, as described in 19, supra, should be held liable to the defendant for the amount of the judgment entered against the defendant.

WHEREFORE, the defendant, United States of America, demands judgment against the third-party defendant City of Poughkeepsie for all sums recovered against the defendant, United States of America, by the plaintiff in this action, for its costs and expenses incurred in the defense of this action, and for such other relief as the Court deems

GAR: jp 72-2807

necessary and just.

Dated: New York, New York

April 26, 1973

WHITNEY NORTH SEYMOUR, Jr.
United States Attorney for the
Southern District of New York
Attorney for the Defendant and
Third-Party Plaintiff,
United States of America

Y: X (Q)

Assistant United States Attorney
Office & P. O. Address:

United States Courthouse

Foley Square

New York, New York 10007

Telephone (212) 264-6328

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

FRANCESCO CORDARO,

Plaintiff.

THIRD-PARTY ANSWER

72 Civ. 3644 MIG

UNITED STATES OF AMERICA.

- Defendant.

UNITED STATES OF AMERICA.

Third-Party Plaintiffs,

CITY OF POUGHKEEPSIE,

Third-arty Defendant.

Third-party defendant, City of Poughkeepsie, by its attorney,

Jeffrey S. Graham, a duly appointed and acting Corporation Counsel, in

answer to the third-party complaint herein, sets forth the following, upon
information and belief:

FIRST: Denies knowledge or information sufficient to form a belief as to each and every allegation contained in paragraphs numbered 1, 3, 4, 5, 7, 8, and 9.

SECOND: Denies each and every allegation contained in the paragraph numbered 10.

AS AND FOR AN AFFIRMATIVE DEFENSE

THRD: That on and before the date of the accident in the third-party complaint Section 200 of the Charter Laws of the City of Poughkeepsie provided in substance that the City of Poughkeepsie "shall not be liable for the damage or injuries sustained by any person in consequence of any street, highway... in said city being out of repair, unsafe, dangerous... in any way or manner, unless written notice of the

defective condition of said street shall have been given to the Superintendent of Public Works or the Superintendent of Streets of said city at least twenty-four (24) hours previous to such damage or injury.

FOURTH: No such written notice of the defective condition of the street alleged in this third-party complaint was given to the Superintendent of Public Works or the Superintendent of Streets within twentyfour (24) hours prior to December 7, 1969.

WHEREFORE, the third-party defendant, City of Poughkeepsie, demands judgment against the third-party plaintiff dismissing the third-party complaint herein with the reasonable costs and expenses incurred in the defense of this action and for such other and further relief as to the court seems just and proper in the premises.

Dated: Poughkeepsie, New York May 21, 1973

Jeffrey'S Graham

Assistant Corporation Counsel

Office & P.O. Address

Municipal Building Memorial Square

Poughkeepsie, New York 12602

Telephone (914) 485-4714

GAR: art 72-2807

STATE OF NEW YORK SUPREME COURT: COUNTY OF DUCHESS

FRANCESCO CORDARO,

Plaintiff,

NOTICE OF REMOVAL

Summons No.

RICHARD H. LUSARDI,

Defendant.

SIRS:

PIEASE TAKE NOTICE that a verified petition, a copy of which is ammexed hereto, requesting removal of the above-entitled action, which is pending in the Duchess County Supreme Court of the State of New York, to the United States District Court for the Southern District of New York, was filed this day with the Clerk of said District Court pursuant to the provisions of 28 U.S.C. \$\$1442(a)(3), 1446 and 2679(d).

Dated: New York, New York

August 25, 1972

Yours, etc.

WHITNEY NORTH SEYMOUR, Jr.
United States Attorney for the
Southern District of New York
Attorney for the defendant,
Richard H. Lusardi

GERALD A. ROSENBERG
Assistant United States Attorney
Office and Post Office Address:
Room 328, United States Courthouse
Foley Square
New York, New York 10007
Telephone: (212) 264-6328

GAR:11f 72-2807

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

-ve

FRANCESCO CORDARO,

PETITION FOR REMOVA

72 Civ. 3644

M.I.G

Plaintiff,

RICHARD H. LUSARDI.

Defendant.

TO THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK:

The petition of Richard H. Lusardi, defendant in this action, by Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, attorney for the defendant, respectfully states on information and belief that:

- 1. On November 7, 1969, a collision occurred in Poughkeepsie, New York between a vehicle operated by the plaintiff, Francesco Cordaro and a vehicle operated by the defendant, Richard H. Lusardi. The vehicle operated by the defendant was owned by the United States of America.
- 2. On November 7, 1969, the defendant was amployed by the National Park Service, within the Department of the Interior, an agency of the United States of America. At the time of the aforementioned collision, the defendant was operating the government-owned vehicle within the scope of and in the course of his employment.

- 3. On July 12, 1972, the defendant was served with a summons, dated June 14, 1972, issued by the Supreme Court of the State of New York for Duchess County. The summons stated that the object of the action was negligence and that the relief sought was money damages. No complaint was attached to the summons. A copy of the summons is attached hereto as Exhibit A hereof.
- 4. No trial of the issues presented in the summons has been commenced.
- 5. This action may be removed pursuant to the terms of 28 U.S.C. §§1442(a)(3), 1446 and 2679(d).
- 6. Annexed hereto are copies of all process, pleadings and orders served upon the defendant in the pending state action.

WHEREFORE, it is respectfully requested that said action be removed to this Court for trial and determination pursuant to 28 U.S.C. \$1441 et seq.

Dated: New York, New York

August 24, 1972

Yours, etc.

WHITNEY NORTH SEYMOUR, Jr.
United States Attorney for the
Southern District of New York
Attorney for the Defendant,
Richard H. Lusardi

y: GAR

GERALD A. ROSENBERG
Assistant United States Attorney
Office and Post Office Address:
Room 328, United States Courthouse
Foley Square
New York, New York 10007
Telephone: (212) 264-6328

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

----X

FRANCESCO CORDARO,

Plaintiff,

REPORT OF MAGISTRATE

- against -

72 Civ. 3644

RICHARD H. LUSARDI,

Defendant.

_____Y

This is a negligence action against the driver of a government-owned vehicle originally instituted September 1972 in the state court, Dutchess County, and removed to this Court pursuant to Title 28 \$2679(d) which provides for removal where "the defendant-employee was acting within the scope of his employment at the time of the incident out of which the suit arose". Section 2679 Subdivision (b) provides that the remedy by suit against the United States, as provided in \$1346(b), shall be exclusive of any other action by reason of the same subject matter against the employee.

moved for an order substituting the United States as defendant and also dismissing the action on substantive grounds (release and untimely notice). In its supporting affidavit (September 19, 1972, p. 3), the government stated that the defendant "was an employee of the National Park Service, within the Department of the Interior, on November 7, 1969 and was, at the time of the collision that is the subject of this action, acting in the course and within the scope of his employment". In an opposing affidavit (November 1972, p. 3) plaintiff's attorney raised an

the investigation conducted by this office indicates that he (the employee) was some 15 miles from the place of his employment when this accident occurred and was doing his own personal business" (p. 4). By order dated November 27, 1972 Judge Gurfein stated "A hearing will be held on whether to remand to the state court. The matter is referred to Magistrate Jacobs to hear and report". I understand that the reference, therefore, is limited to the question whether the employee was "acting in the course and within the scope of his employment".

A hearing was held on December 26, 1972 at which the government presented the testimony of the employee (Richard II. Lusardi), the superintendent of the Roosevelt-Vanderbilt National Historic Site (Stuart H. Maule), and certain documentary evidence. Plaintiff did not present any evidence. The employee, whose testimony I credit, testified as follows: He was a park guard at the Site at Hyde Park, New York, having been so employed for six years (10). On Friday, November 7, 1969 he was on duty between 4 and 12 pm (10). He was asked by the superintendent (Mr. Maule) to pick up certain maps at the County Highway Department on Route 44 in Poughkeepsie, New York (11). It was part of his duties to perform such errands (28). The · Highway Department was about 15 miles from the Vanderbilt mansion (12). He left the mansion a little after 4:00 o'clock (21). He picked up the maps and while returning to the Vanderbilt Site the accident occurred, about 4:30 pm. He took the direct route to and from the Highway Department. He was only at the Highway Deartment for a minute or two and the accident occurred whan

he was about 1/4 of the way back to the mansion (26). During the entire trip he did not make any unscheduled stops (15). A schedule of assignments of employees (Ex. 1) and a record of hours worked (Ex. 2) confirm that the employee was scheduled to work and was working and on duty at the time of the accident.

The evidence clearly establishes that the employeedefendant at the time of the accident was "acting within the
scope of his employment". Accordingly, I conclude that the
United States should be substituted as the defendant and that
this Court has jurisdiction of the action.

Dated: New York, New York January 12, 1973

Respectfully submitted,

Martin D. Jacobs United States Magistrate GAR:ko 72-2807

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

FRANCESCO CORDARO.

Plaintiff.

NOTICE OF MOTION

72 Civ. 3644 MIG

RICHARD H. LUSARDI,

Defendant.

SIR:

PLEASE TAKE NOTICE that upon the Memorandum of Law and Affidavit submitted herewith, the undersigned will move this Court, before the Honorable Murray I. Gurfein, in Room A of the United States Courthouse, Foley Square, New York, New York, on the 10th day of October, 1972 at 10th to 'clock, or as soon thereafter as counsel may be heard, for an order substituting the United States of America as the defendant, pursuant to 28 U.S.C. § 2679 (d), and for an order dismissing the complaint herein, pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, upon the ground that the Court lacks jurisdiction over the subject matter of the action and that the complaint fails to state a claim upon which belief cam be granted, in that the action is barred under several

provisions of the Federal Tort Claims Act, 28 U.S.C. §2671 et seq. and under 28 U.S.C. §2401(b).

Dated: New York, New York

September 19, 1972

Yours, etc.

WHITNEY NORTH SEYMOUR, JR.
United States Attorney for the
Southern District of New York
Attorney for the defendant
Richard H. Lusardi

Bv:

GERALD A. ROSENBERG
Assistant United States Attorney
Office and Post Office Address:
United States Courthouse
Foley Square
New York, New York 10007
Telephone: (212) 264-6328

TO: MARSHALL L. BRENNER, ESQ. Attorney for Plaintiff 35 Market Street Poughkeepsie, N.Y. 12601 UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

FRANCESCO CORDARO

Plaintiff,

AFFIDAVIT

72 Civ. 3644 MIG

RICHARD H. LUSARDI.

Defendant.

STATE OF NEW YORK :
COUNTY OF NEW YORK :
SOUTHERN DISTRICT OF NEW YORK)

GERALD A. ROSENBERG, being duly sworn, deposes and says:

88.1

- 1. I am an Assistant United States Attorney in the office of Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, attorney for the defendant herein, Richard H. Lusardi, and as such I am in charge of and familiar with the above action.
- 2. This affidavit is submitted in support of defendant's motion, pursuant to 28 U.S.C. \$2679 (d) and Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, for two orders: one substituting the United States of America as defendant, the second, dismissing the complaint because the Court lacks subject matter jurisdiction and because the complaint fails to state a claim upon which relief can be granted.
- 3. By a memorandum dated August 14, 1972, the United States Attorney for the Southern District of New

York was requested by Assistant Attorney General Harlington Wood, Jr. of the Department of Justice to defend this action. Accompanying the memorandum request were files maintained by the Solicitor of the Department of the Interior pertaining to this action. Those files have been turned over to me and are now in my custody.

- A. The files within my custody reflect that on March 25, 1971, the plaintiff (and his insurer, the United Security Insurance Company) executed a release as part of an agreement with the Department of the Interior, under which the Department of the Interior agreed to pay to the plaintiff and his insurer the sum of Five Hundred Fifty-Four Dollars and Eleven Cents (\$554.11) as full compensation for all damage suffered by plaintiff in connection with a collision that occurred on November 7, 1969 between plaintiff's 1966 Ford sedan and a 1968 Chevrolet station wagon owned by the Department of the Interior and driven by the defendant, Richard H. Lusardi. A copy of the agreement, captioned "VOUCHER FOR PAYMENT UNDER FEDERAL TORT CLAIMS ACT", is attached hereto and made Exhibit A hereof.
 - 5. The files within my custody also show that the first and only Standard Form 95 "Claim for Damage or Injury" with reference to the subject automobile collision was received by the Department of the Interior on July 17, 1972, more than two years after the time of the accident. A copy of the above-described Claim Form is attached hereto and made Exhibit B hereof.

- 6. On or about September 5, 1972 I spoke by telephone with deputy clerks of the Dutchess County Supreme Court and the Dutchess County Clerk's office. I was informed that no complaint bearing the index number of the subject action 2207/72 had yet been filed. On that same day I posted a letter to the plaintiff's attorney, Marshall L. Brenner, requesting a copy of the complaint. Under cover of a letter dated September 12, 1972, Mr. Brenner forwarded to me a copy of the complaint in this action. A copy of said complaint is attached hereto and made Exhibit C hereof.
- 7. The files within my custody also show that the defendant Richard H. Lusardi was an employee of the National Park Service, within the Department of the Interior, an agency of the United States of America, on November 7, 1969 and was at the time of the collision that is the subject of this action acting in the course of and within the scope of his employment.

WHEREFORE, your deponent respectfully requests that the motion of the defendant for two orders, (1) substituting the United States of America as defendant and (2) dismissing the complaint be granted.

ssistant United States Attorney

Sworn to before me this

19th day of September, 1972

Notary Public of the York No. 41-2008 County Term Express March 39, 1973

Btaniford Form No. 1145
Form prescribed by
Compisolist General, U. 8,
February 12, 1947
General Regulations No. 110

YOUCHER FOR PAYMENT UNDER FEDERAL TORT CLAIMS ACT

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| Bu. Vo | u. No | | |
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{ on Treasurer of the United States in favor of paper named above.

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| the Inter | ior | ata bijahment) | | | |
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| | d Security | Insurance Con | mpany | | |
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| gave rise to the | claim, by reason | SIGN ORIGINAL ONLY | ct matter. | Whom K HP | Krail Di |
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| | the Inter (Decional Soli and Unite ceet, Pough mise, or settleme Alm: (See attac f claim for n when it wagon bein on Novembe eby accept the wacomplete rele gave rise to the cexamined in acc Claims Act, ap | C the Interior (Department, bureau, or exional Solicitor's Off (Give and United Security (Payeo) reet, Poughkeepsie, Ne Date claim accru Five Hund nise, or settlement and Eleve AIM: (See attachments for further wagon being operated on November 7, 1969. ACCEPT eby accept the within-stated awa a complete release by me of any gave rise to the claim, by reason (Claims Act, approved August 2) examined in accordance with the Claims Act, approved August 2 Accounting Classifications Obligations Obligations | Chaim for property damage to claim when it was in collision with a wagon being operated by an employ on November 7, 1969. ACCEPTANCE BY CLAIM edges to the claim, by reason of the same subjective rise to the claim, by reason of the same subjections. ACCEPTANCE BY CLAIM edges to the claim, by reason of the same subjective rise to the claim, by reason of the same subjections. Title Regional Solicitor. Appropriation title | Cost accounts Title Regional Solicitor Contains accordance with the pro- Claims Act, approved August 2, 1946, Title Regional Solicitor Contains Solicitor Solfice (Overplace and data) Oplications (Overplace and data) Oplications (Overplace and data) Oplications (Overplace and data) Oplications Oplication | Claim No. Claim Solicitor's Office Claim Solicitor's Office Claim Solicitor's Office Claim Solicitor's Office Claim Company (Payon) Ceet, Poughkeepsie, New York Date claim accrued Five Hundred Fifty-Four Dollars nise, or settlement and Eleven Cents Amenatics of further explanation in detail) f claim for property damage to claimant's 1966 Ford 4-door on when it was in collision with a government owned 1963 Che wagon being operated by an employee of the National Park on November 7, 1969. ACCEPTANCE BY CLAIMANT by accept the within-stated award, compromise, or settlement as final and conclusive on a complete release by me of any claim gainsts the United States and against the couple gave rise to the claim, by reason of the same subject matter. SIGN ORIGINAL BY: United Security Claims Act, approved August 2, 1946, Claims Act, approved August 2, 1946, Title Regional Solicitor Accounting Classification (for complation by Administrative Office) Appropriation title Cest Account Objective Classification of Control Cont |

Standard Form 95 Revised June 1953 Promulgated by Buryan of the Budget Circular A-5 (Rev.)

Redic at to liter Department L. die Interior

' TO: SU

CLAIM FOR DAMAGE OR INJURY

(Use additional sheets if necessary)

JUL 1 7 1972

Philadainhia Do

| se ink or typewriter. See reverse side for instructions and additional information r | equired. | |
|--|-----------------|---------------|
| FRANCESCO CORDARO | AMOUNT OF CLAIM | |
| ADDRESS OF CLAIMANT (Street, city, zone, State) 46 Lent St., Poughkeepsic, N.Y. | PROPERTY DAMAGE | 3 |
| PLACE OF ACCIDENT (Give city or town and State: if outside city limite, indicate mileage or distance to nearest city or town) On Bement St. at intersection w/Harrison St. in Poughkeepsie, Dutchess County, N.Y. | PERSONAL INJURY | : 100,000.00 |
| DATE AND DAY OF ACCIDENT TIME (A. M. or P. M.) 11/7/69 - Friday 4:45 p.m. | TOTAL | \$ 100,000.00 |
| DESCRIPTION OF ACCIDENT—STATE BELOW, IN DETAIL ALL KNOWN FACTS AND CIRCUMSTANCE PERSONS AND PROPERTY INVOLVED AND THE CAUSE THEREOF | | |

Poughkeepsie, at the intersection with Harrison St. in the City of Pough-Poughkeepsie, Richard H. Lusardi, an agent, servant & employee of the United States Government, was operating a 1968 Chevrolet, U.S. Government License No. I-95618 w/the consent & permission of the U.S. Government, and operated said vehicle so negligently as to run through a stop sign without stopping, on Harrison St., such that the claimant operating a 1966 Ford, License No.1487PT. w/the consent & permission of Pierina Cordaro, owner, ng on Bement St. Could not avoid the vehicle operated by Lusardi & the

ADDRESS OF OWNER, IF OTHER THAN CLAIMANT ALUSardi vehicle collided w/th

BRIEFLY DESCRIBE KIND AND LOCATION OF PROPERTY AND NATURE AND EXTENT OF DAMAGE. SEE INSTRUCTIONS ON REVERSE SIDE FOR METHOD OF SUBSTANTIATING CLAIM

PERSONAL INJURY

STATE NATURE AND EXTENT OF INJURY WHICH FORMS THE BASIS OF THIS CLAIM

Cervical and low back strain; pain and stiffnessof the neck and back, pain _ and limitation of motion of the head, neck, back and legs; pains radiating throughout the chest and abdomen and down the back of both legs.

| 9. WITN | ESSES . |
|--|---|
| NAMES | ADDRESSES |
| | |
| CRIMINAL PENALTY FOR PRESENTING FRAUDU- LENT CLAIM OR MAKING FALSE STATEMENTS | 10. I DECLARE UNDER THE PENALTIES OF PERJURY THAT THE AMOUNT OF THIS CLAIM COVERS ONLY DAMAGES AND INJURIES CAUSED BY THE ACCIDENT ABOVE DESCRIBED. IL ADREE TO ACCEPT SAID AMOUNT IN FULL SATISFACTION AND FINAL SETTLEMENT OF |

Fine of not more than \$10,000 or imprisonment for not more than 5 years or both. (See 62 Stat. 698, 749; 18 U. S. C. 237, 1001.)

CIVIL PENALTY FOR PRESENTING FRAUDULENT CLAIM

The claimant shall forfeit and pay to the United States the sum of \$2,000, plus double the amount of damages sustained by the United States. (See R. S. §3490, 5438; \$1 U. S. C. 251.)

SIGNATURE OF CLAIMANT

DATE OF CLAIM

March 21, 1971

NOTE: Signature used above should be used in all future correspondence.

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

FRANCESCO CORDARO,

Plaintiff,

AFFIDAVIT

-against-

72 CIV. 3644 MIG

RICHARD H. LUSARDI.

Defendant.

..........X

STATE OF NEW YORK

COUNTY OF DUTCHESS :

SOUTHERN DISTRICT OF

NEW YORK : ss.:

MARSHALL L. BRENNER, being duly sworn, deposes and says:

- 1. That I am an attorney at law duly licensed to practice my profession and further having been duly admitted to the practice of law before the Southern District of New York on the 1st day of May, 1969. That your deponent maintains offices for the practice of his profession at 35 Market Street, Poughkeepsie, New York.
- 2. That your deponent is the attorney for the Plaintiff in the above captioned matter and makes this Affidavit in opposition to the Motion brought by Gerald A. Rosenberg, Assistant United States Attorney for a dismissal of the Complaint because the Court lacks subject matter jurisdiction and because the Complaint fails to state a claim upon which relief can be granted.
- 3. That attached heroto and forming a part hereof is an Affidavit of MELINDA REAGAN, your deponents former secretary in which she states uncategorically that a Notice of Claim was served upon the United States by the mailing of two (2) copies of the Notice of Claim on the 9th day of April, 1971, well within the

statutory period. That a copy of the cover letter forwarded to the United States Department of the Interior is attached hereto and forms a part hereof.

- 4. That after the date of April 9, 1971 your deponent did not receive any notice from the Government with respect to the approval or denial of the said claim. That your deponent thereupon looked upon the Governments position as having denied the claim. That your deponent believes that the proof submitted herewith together with this affidavit should lay to rest the first portion of the argument of Mr. Rosenberg forever.
- 5. Mr. Rosenberg next incorrectly argues that my client executed a release as part of an agreement with the Department of Interior which release is dated March 25, 1971. The voucher for payment is attached to Mr. Rosenberg's papers.
- 6. Your deponent respectfully requests the Court's indulgence inasmuch as this is the first case which your deponent has had of this nature in a Federal District Court. Your deponent must state that he is appalled at the argument concerning the voucher for payment which Mr. Rosenberg puts forth. An examination of the form of the voucher for payment shows the words typed in that this was "award of claim for property damage..." This release and voucher was strictly limited to the property damage claim which was submitted by the Plaintiff's insurance carrier directly to the Government under a subrogation agreement which was incompassed within the terms of the Plaintiff's insurance policy and the liability carrier. It should be called to the Court's attention that in the case of liuber v. U.S., 244 Fed. Supp. 537(N.D. Cal. 1965) a case cited by 'r. Rosenberg that in that case a claim form was submitted for both personal injuries and property damage. That when the check was forwarded to the

claimant there was no notation that this was for property damage and the court held that inasmuch as there was no designation with respect to the property damage claim as opposed to the personal injury claim that the claimant would be barred. Here, in our case, the voucher for payment clearly indicates that this is for property damage to the claimant's 1966 Ford vehicle. The case of Wexler v. Newman, 311 F. Supp. 906 also cited by Mr. Rosenberg was a similar case to the Huber case where the Court held that there was no notation on the check that it was for property damage only. Wexler had submitted a claim for property damage only and was paid. He was thereupon procluded from ascerting another claim for bodily injury. Again, the facts of our case are different. Our voucher clearly states that this is for property damage to the claimant's 1966 Ford.

- 7. It is clearly submitted that there was no intention to sign anything other than that which was actually signed, i.e. a voucher for payment for the property damage to the vehicle concerned. This is not merely a mental reservation of the claimant but an actual reservation as filled in on the voucher for payment which was accepted by the Government as shown on the voucher statement attached to Mr. Rosenberg's papers.
- 8. Your deponent respectfully submits that the claimant in this case has not failed to pursue his administrative remedies, further, has not accepted an administrative settlement for his personal injuries which would proclude the filing of a complaint and similarly does not concede to the Covernment the contention of Mr. Rosenberg that although the complaint states he was operating the Government Station Wagon with the "consent and permission" of his employer this means he was acting within the scope of his employment. Indeed, the investigation conducted by this

office indicates that he was some 15 miles from the place of his employment when this accident occured and was doing his own personal business. Whether the Government will concede that that is within the scope of the employment is highly questionable. The Government may allow an employee to use its vehicle to carry out his personal errandsor to travel to and from his home but this is highly questionable, in your deponents mind, as to whether this is operating the vehicle "within the scope of his employment".

9. Your deponent requests the Court's indulgence with respect to the manner in which your deponent has set forth his arguments on behalf of the claimant-plaintiff and indicates to the Court that his file with respect to other proof and other information which the Court may wish to hear either oral argument or have presented before it, is available to the Court.

WHEREFORE, your deponent prays for an Order of the Court dismissing the motion of the Defendants in its entirety together with whatever relief may be to the Court just and proper.

MARSHALL L. BRENNER

Sworn to before me this

8th day of November, 1972.

Notary Public

CHESTER II. CORDON
NOTARY PUBLIC, COTTL CONTRY YORK
NESS INC. COMM. SERVING COMM. SERVING COMM.

April 9, 1971

UNITED STATES DEPARTMENT OF THE INTERIOR Office of the Solicitor Second Bank Building 420 Chestnut Street Philadelphia, Pa. 19106

ATTENTION: William W. Redmond, Regional Solicitor

RE: F.P. Cordaro, Claim no. 218654-Policy no. 13-033-31978

LOSS OF: 11/7/69

Dear Sir:

Per yours of April 1, 1971, enclosed find claim forms re the above matter.

I would appreciate hearing from you per mine of March 25, 1971.

Very truly yours,

Marshall L. Brenner

MLB:mr Encl. STATE OF NEW YORK

COUNTY OF DUTCHESS : ss.:

MELINDA REGAN, being duly sworn deposes and says:

That on April 9, 1971 I was employed by MARSHALL L. BRENNER, ESQ., an attorney at law at 35 Market Street, Poughkeepsie, New York.

That April 9, 1971 I was over the age of 18 years and resided at Wappingers Falls, New York. That on said date I served Claim Forms executed by FRANCESCO CORDARO upon the UNITED STATES by mailing two (2) copies thereof to the UNITED STATES DEPARTMENT OF THE INTERIOR, OFFICE OF THE SOLICITER, SECOND BANK BUILDING, 420 Chesnut Street, Philadelphia, Pa., 19160, enclosed with a cover letter in a post paid wrapper which I deposited in a United States receptical for mail located at the intersection of Market and Cannon Streets, in the City of Poughkeepsie, Dutchess County, New York.

Melinda Reagan

Melinda Regan

Sworn to before me this

Hh day of October, 1972.

Witness:

Diane E. Ermendor

Notary Public

MARSHALL L. BRENNESS HOTARY PUBLIC, STATE OF NEW YOOK RESIDING IN GUIL HESS COUNTY, SUP & SSION EXPIRES MARCH 30, 7%.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

U.S. DISTRICT COURT FEB | 2 52 FH 77: S.D. OF N.Y.

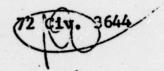
FRANCESCO CORDARO,

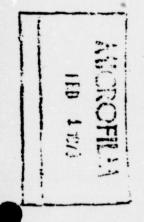
Plaintiff,

-against-

RICHARD H. LUSARDI,

Defendant.





APPEARANCES

MARSHALL L. BRENNER Attorney for Plaintiff Poughkeepsie, N.Y.

WHITNEY NORTH SEYMOUR, JR.
United States Attorney for the
Southern District of New York
New York, N.Y.
By: Gerald A. Rosenberg,
Of Counsel.

39165

GURFEIN, D. J.

This is an action for personal injuries allegedly resulting. from a collision on November 7, 1969 in Poughkeepsie between an automobile driven by the plaintiff and a Chevrolet station wagon operated by the defendant, Richard H. Lusardi, and owned by his employer, the National Park Service of the Department of the Interior, an agency of the United States.

The action was begun in the Dutchess County Supreme Court on July 12, 1972 by the service of a summons on the defendant. On August 25, 1972 the action was removed from the State Court to this Court pursuant to 28 U.S.C. §1442(a)(3), 1446 and 2679(d). The removal was proper under §2679(d) if "the defendant employee was acting within the scope of his employment at the time of the incident out of which the suit arose." The removal by the Government was prompt—within six weeks of the service of the complaint on its employee.

The Government has now moved (1) for the substitution of the United States as the party defendent; and (2) for dismissal of the action under Fed.R.Civ.P. 12(b)(1) and 12(b)(6) because plaintiff failed to pursue his administrative remedies as a result of which there is no jurisdiction over the subject matter, and because the acceptance by the plaintiff of an administrative settlement effected a release of the claim for personal injuries.

I

To determine the question of whether the defendant was an employee of the United States acting within the scope of his employment at the time of the indident I referred the issue to Magistrate Jacobs to hear and report. He réports that the defendant was so acting. I have reviewed his report and confirm

the finding. Accordingly, the United States is substituted as the party defendant.

II

United States for personal injury resulting from the operation of a motor vehicle in the scope of his employment is exclusive of any other civil action by reason of the same subject matter against the employee whose act or omission gave rise to the claim. This exclusivity of remedy in turn requires a compliance with the conditions precedent to an action in tort against the United States.

28 U.S.C. §2675(a), as amended in 1966 by Pub.L.89-506 §2,
80 Stat.306, now provides that an administrative claim is a prerequisite to filing or maintaining a civil action under the
Federal Tort Claims Act. <u>Driggers v. United States</u>, 309 F.Supp.
1377 (D.S.Car. 1970). It is further provided that a tort claim
against the United States shall be forever barred unless it is
presented in writing to the appropriate federal agency within
two years after such claim accrues or "within six menths after the
date of mailing, by certified or registered mail, of notice of
final denial of the claim by the agency to which it was presented.
28 U.S.C. §2401(b).

In this case there were two presentations of claim. The first was informal and resulted in an accord whereby the plaintiff and his insurer accepted \$554.11 for property damage and executed a general release.

The second presentation of claim, this time in a formal way, was allegedly received by the Department of the Interior on July 17, 1972 although it gave the original date of claim as March 21, 1971.

An affidavit from the secretary of the plaintiff's lawyer has been presented in which she swears that on April 9, 1971 she served "Claim Forms executed by Francesco Cordaro upon the United States by mailing two (2) copies thereof to the United States Department of the Interior, Office of the Solicitor, Second Bank Building, 420 Chestnut Street, Philadelphia, Pa. 19160, enclosed with a cover letter in a post paid wrapper which I deposited in a United States reciprocal for mail located at the intersection of Market and Common Streets in the City of Poughkeepsie, Dutchess County, New York." Annexed to this affidavit is a copy of the letter mentioned reading: "Per yours of April 1, 1971, enclosed find claim forms re the above matter. I would appreciate hearing from you per mine of March 25, 1971. Very truly yours, Marshall L. Brenner."

Proof of mailing creates a rebuttable presumption of receipt. Bagner v. United States, 285 U.S. 427, 430 (1932). The circumstance that the date of March 21, 1971 as it appears on the July 17, 1972 claim coincides with the date of the covering letter strongly supports the presumption. There is, at least, an issue of fact and summary judgment cannot be rendered on behalf of the Government upon the ground that no claim was made by the plaintiff administratively within two years of the accident. 28 U.S.C. §2401(b).

Nor can summary judgment be granted on the theory of release or accord and satisfaction. Although these are affirmative defenses to be pleaded, Fed.R.Civ.P. 8(c), they may be considered before answer under Rule 12(b)(6) if the motion to dismiss is converted into one for summary judgment under Fed.R.Civ.P. 56.

See Nemitz v. Norfolk and Western Ry. Co., 287 F.Supp. 221, 231

(N.D.Ohio 1968); Huber v. United States, 244 F.Supp. 537 (N.D.Cal. 1965).

The Government contends that the execution of a general release by the plaintiff, albeit in connection with a claim for property damage, bars a claim for personal injuries arising out of the same collision as matter of law. If federal law is properly applicable, the United States has support for its view

in <u>Huber v. United States</u>, <u>supra</u>, and <u>Wexler</u> v. <u>Newman</u>, 311 F.Supp. 905, 907 (E.D.Pa. 1970).

The cases cited each assumed that federal law governs the validity of the release. I express the view, with deference, that state law governs the validity of the release.

The Federal Tort Claims Act gives the District Courts
jurisdiction of actions for injury caused by an employee of
the UnitedStates "under circumstances where the United States,
ida private person, would be liable to the claimant in accordauce with the law of the place where the act or emission occurred."
26 U.S.C.\$1246(h). The purpose was to make the proper state
law the model for the liabilities which the United States
consented to accept. <u>Rushford v. United States</u>, 204 F.2d 831,
832 (2 Cir. 1953). There is no question that "the act or
omission" referred to in the statutes is the act of negligence and this act concededly occurred in New York State.

The Court of Appeals for this Circuit has, indeed, held that the effectiveness of a release given to the United States by the plaintiff's decedent before his fatal airplane flight was governed by state law. Montellier v. United States, 315 F.2d 180, 184-85 (2 Cir. 1963). The Court reasoned that the purpose of the Tort Claims Act was "to render the Government liable in tort as a private individual would be under like

circumstances. Richards v. United States, 369 U.S. 1, 6 (1962)"; and that since under Massachusetts law a release would not bar the plaintiff's suit against a private person in the circumstances of the Montellier case, it would not bar her suit against the Government.

To determine whether the application of New York law to the validity of the release would make any difference in result, the facts surrounding the release should be noted.

United Security Insurance Fund, entered into correspondence with the Department of the Interior. No formal claim was filed under the provisions of the Tort Claims Act. 28 U.S.C. \$2675(a). The parties, nevertheless, informally reached an agreement on March 25, 1971 unter the terms of which the Department agreed to pay to the plaintiff and his insurer the sum of \$554.11. The agreement was recorded on Form 1145--"Voucher for Payment Under Federal Tort Claims Act."

Under the heading "Brief Description of Claim" there was typewritten the folkwing: "Award of claim for property damage to claimant's 1966 Ford 4-door Suburban when it was in collision with a government owned 1968 Chevrolet station wagon being operated by an employee of the National Park Service on Novem-

ber 7, 1969." There was no reference to any claim for personal injury. Under "Acceptance by Claimant" there is printed:

"I, the claimant do hereby accept the within-stated award, compromise, or settlement as final and conclusive on me, and agree that said acceptance constitutes a complete release by me of any claim against the United States and against the employee of the Government whose act or omission gave rise to the claim by reason of the same subject matter."

The issue is whether the general language in the release is conclusive or whether parol evidence is available to explain the intention of the parties with regard to the scope of the release.*

In New York the liberal view has been adopted. A general release does not always mean what it seems to say. As Judge Fuld wrote in <u>Cahill</u> v. <u>Regan</u>, 5 N.Y. 2d 292, 299 (1959):

"Although the effect of a general release, in the absence of freud or mutual mistake, cannot be limited or curtailed (see

^{*} The parol evidence rule is a rule of substantive law. Smith v. Bear, 237 F.2d 74, 83 (2 Cir. 1956); Eskimo Pie Corp. Whitelawn Dairies, 284 F.Supp. 987, 992 (S.D.N.Y. 1963, Mansfield, J.).

Lucio v. Curran, 2 N.Y.2d 157, 161; Kirchner v. New Home

Sewing Mach. Co., 135 N.Y. 182, 188), its meaning and

coverage necessarily depend, as in the case of contracts

generally, upon the controversy being settled and upon the

purpose for which the release was actually given. Certainly,

a release may not be read to cover matters which the parties

did not desire or intend to dispose of." See also Mangini v.

McClurg, 24 N.Y. 2d 556, 562 (1969): "...the cases are many in

which the release has been avoided with respect to uncontemplated

transactions despite the generality of the language in the release

form."

Treating the 12(b)(6) motion as a motion for summary judgment on behalf of the United States it is denied.

It is so ordered.

J.S.D.J.

Dated: February 1, 1973.

| | /\ 00 | |
|----|--|--|
| 1 | UNITED STATES DISTRICT COURT | |
| 2 | SOUTHERN DISTRICT OF NEW YORK | |
| 3 | SOUTHERN DISTRICT OF NEW YORK | |
| 4 | FRANCESCO CORDARO, | |
| 5 | Plaintiff, | |
| 6 | -vs- | |
| 7 | RICHARD H. LUSARDI & THE UNITED STATES | |
| 8 | OF AMERICA, 72 Civ 3644 | |
| 9 | Defendants and Third- Party Plaintiffs, | |
| 10 | -vs- | |
| 11 | CITY OF POUGHKEEPSIE, | |
| 12 | Third-Party Defendant. | |
| 13 | × | |
| 14 | BEFORE: | |
| 14 | | |
| 15 | HON. MURRAY I. GURFEIN, | |
| 16 | District Judge | |
| 17 | New York, New York November 13, 1973 - 10:00 AM | |
| 18 | ROVERIBET 13, 1973 - 10:00 AM | |
| 19 | APPEARANCES: | |
| 20 | MARSHALL L. BRENNER, ESQ., Attorney for Plaintiff, | |
| 21 | BY: JOHN DONOGHUE, ESQ., of Counsel | |
| 22 | PAUL J. CURRAN, United States Attorney, | |
| 23 | Southern District of New York, Attorney for Defendants and Third-Party Plaintiffs, | |
| | BY: GERALD A. ROSENBERG, | |
| 24 | DENNISON YOUNG, JR., Assistant United States Attorneys | |

APPEARANCES (cont.)

JEFFREY GRAHAM, Assistant Corporation Counsel, Attorney for the City of Poughkeepsie

(Trial begins.)

(In open court.)

THE COURT: Gentlemen, I am conscious of the fact that there is a motion pending to dismiss the defenses of the third-party defendant, City of Poughkeepsie.

I am going to reserve decision on that until after the conclusion of the trial.

MR. GRAHAM: The return date was set forth after the date for the commencement of the trial. As a result of that no answering papers have yet been submitted by the third-party defendant, which I'd like to have an opportunity to submit prior to the determination as to that particular question.

THE COURT: You mean you want time for a brief?

MR. GRAHAM: Yes, I'dlike to answer it. He submitted a brief and I'd like to answer it.

THE COURT: How much time do you want?

MR. GRAHAM: I'd like to see how we make out during trial motions that will be made by both sides.

THE COURT: You have to speak up, everybody.

The acoustics are very bad in this room.

Remind me about it at the end of the case.

MR. GRAHAM: Okay, fine, your Honor.

THE COURT: All right, plaintiff may proceed.

MR. DONOGHUE: Your Honor, at a pre-trial conference held in this matter it was agreed between plaintiff, the United States Government and the City of Poughkeepsie, that the trial scheduled for today--and also for the Court--that the trial today would proceed on the issue of liability alone.

THE COURT: Was that agreed by everybody?

MR. ROSENBFRG: Agreed, your Honor.

MR. GRAHAM: Yes, your Honor.

MR. DONOGHUE: Your Honor, the instant matter concerns an accident which occurred in Poughkeepsie, New York on November 7, 1969. Francesco Cordaro, plaintiff in the instant matter, was struck in the side of his car as he was proceeding through a city street. The car that struck him was operated by Richard Lusardi who at the time of the accident was an employee of the United States Government, Department of Interior, and working within the scope of his authority.

My first witness will be Francesco Cordaro.

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FRANCESCO CORDARO, called as a witness on his own behalf after being duly sworn testified as follows:

DIRECT EXAMINATION BY

MR. DONOGHUE:

Q State your current address for the record, please.

THE COURT: Your address.

A 46 Lent Street.

Q Your current address is your address today,
46 Lent Street?

A No. I am moving. I got a house and I sold them and now I move to Gifford Avenue.

- What is your address today?
- A 54 Gifford Avenue.
- Q Mr. Cordaro, I direct your attention to the date of November 7, 1969, and I ask you where you were residing at that time.
 - A I was home.
 - Q Where?
 - A In my house.
 - Q What street address were you at at that time?
 - A 46 Lent Street.
 - Q Mr. Cordaro, by whom were you employed on

Cordaro-direct 5 1 Dpa 2 November 7, 1969? Eberhard. 3 A In what capacity? 4 0 Construction. 5 A What specifically was your job title? Q At that time I no remember, shop steward or 7 A Now I am a laborer -- foreman, put it this way, 8 laborer. 9 with the company. Mr. Cordaro, how old are you? 10 Q 11 36. 12 Are you married? Q 13 Yes. Got four kids. 14 Now, let me direct your attention again to November 7, 1969, and ask you if you can state for the 15 16 Court whatever incident may have occurred that afternoon. 17 THE COURT: Do you understand the question? 18 THE WITNESS: Yeah. . I go home, I was home, and, I don't know, 4:30 or quarter to five, I no remember, 19 I was supposed to go pick up my wife, she is working Mill 20 21 Street. That's Bond's Clothes. So I get in my car and

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up my wife.

THE COURT: Excuse me. Just a minute. Could I

I travel Bement Street. Corner of my house Lent and Bement

Street. So I am go south. Go for Lent Street, go pick

| 1 | Dpa Cordaro-direct 6 |
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| 2 | ask, would the government order the minutes of this thing? |
| 3 | MR. ROSENBERG: Yes, your Honor, we will do |
| 4 | that. |
| 5 | THE COURT: Because I have some difficulty |
| 6 | and I want to make sure I understand the witness because |
| 7 | ofhis pronunciation. |
| 8 | MR. ROSENBERG: We will order the minutes, |
| 9 | your Honor. |
| 10 | THE COURT: All right. |
| 11 | Go ahead. |
| 12 | A So I was go from Bement Street, so I get in |
| 13 | an accident, you know. So the car go through and |
| 14 | Q Mr. Cordaro, what was the condition of the |
| 15 | weather at that time? |
| 16 | A Rain. |
| 17 | Q Was it a heavy rain? |
| 18 | A Yeah, it was raining pretty hard. |
| 19 | Q What intersection did the accident which |
| 20 | you just mentioned occur? |
| 21 | A Excuse me, I no understand. |
| 22 | THE COURT: What street was it that you had |
| 23 | the accident? |
| 24 | THE WITNESS: Bement Street. |
| 25 | THE COURT: What other street? |

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THE WITNESS: Harrison Street. Harrison Street I think it was.

THE COURT: Just tell me in your own words how did the accident happen, Mr. Cordaro. You were in your car, right?

THE WITNESS: I am driving.

THE COURT: Which way were you driving?

THE WITNESS: I am driving south. I am driving south and Harrison Street is this way. The only thing I see him, I see this car in the front of me. I never got a chance, you know, to stop, no nothing. It was too close.

THE COURT: Did he strike you or did you strike him?

right in front of me. All of a sudden I got no chance, you know, nothing.

THE COURT: Well, were you hurt?

THE WITNESS: Yeah. The only thing I know I stayed right there. I try to get up, I can't move.

THE COURT: Never mind the extent of the injuries. You say you were hurt. Was your car damaged?

THE WITNESS: My car?

THE COURT: Yes.

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block close to my house.

Q Do you recall what happened at the time of the accident? Did you speak to the other driver?

A The driver come over to me, the driver come over and say, "You all right?"

Q What did you tell him?

A Say, "I am over here. Think I am all right. I don't know, I can't move," I told him.

THE COURT: How did you know which car hit you?

Did you write anything down?

THE WITNESS: No , I nowrite nothing down.

THE COURT: How do you know what the license

number was?

THE WITNESS: I never know what kind of a car, to tell the truth, what kind the car was.

THE COURT: But you are suing somebody now.
You are suing a man named Lusardi, right?

THE WITNESS: Yes.

THE COURT: How did you find out his name?

THE WITNESS: The policeman come over and they sent me to the hospital. The police came over and told me, you know.

THE COURT: I see.

MR. DONOGHUE: I ask this be marked for

identification, please.

(Plaintiff's Exhibit 1 marked for identification.

Q I show you a copy of a document marked

Plaintiff's Exhibit 1. Is your signature the signature
that appears on the second side of that reverse side?

A No, I don't see my signature over here.
Where is my signature?

- Q On the second side, is that your signature?
- A Yes, that's my signature.
- Q Do you know what this document is, Mr. Cordaro?
- A That's when I got the car accident, I guess.
- Q Is this the report of the accident?

A To tell the truth, I don't know how to read too good, you know. I know that's where I live, I guess. That's the address. I don't know how to read too well in English.

MR. DONOGHUE: Your Honor, Mr. Cordaro has difficulty with these written forms that he completed at the time of the accident. I am going to offer this into evidence as a document taken at the time of the accident, which is now on file with the State of New York Motor Vehicle Department.

THE COURT: Any objection?

MR. ROSENBERG: Yes, I will object, your Honor.

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There is no testimony that the report was prepared by a witness to the accident.

THE COURT: Let me see it.

MR. DONOGHUE: Yes, your Honor.

(Handing.)

Your Honor, I believe we can stipulate with the United States Government that the second car involved was the car of Richard Lusardi and thereby withdraw that document.

THE COURT: All right.

MR. DONOGHUE: Is it so stipulated?

MR. ROSENBERG: I so stipulate.

Q Mr. Cordaro, did you speak to the driver of the other car at the time of the accident?

A Excuse me?

Q Did you speak to the driver of the other car at the time of the accident?

A Yeah. He come over to me and said, "How you feeling?" He ask me, "You feel all right? You all right?"

I said, "I think I am all right but I can't move my leg," I said.

- Q Did he say anything to you about the accident?
- A The only thing I remember is he told me,

after the accident?

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Excuse me? A

sign." That's what he said to me.

What happened after the accident?

Well, over there the ambulance come over, they pick me up and they bring me to the hospital.

Do you recall how much time you spent in the Q hospital?

THE COURT: We are just trying liability today.

About seven days. I don't know. A

MR. DONOGHUE: I withdraw the question.

Mr. Cordaro, do you recognize Mr. Richard Q Lusardi in this courtroom at this time?

Yes.

Can you identify for the Court where he is at this time?

He is right here. (Indicating.)

Where?

Over there. (Indicating.)

MR. DONOGHUE: Your Honor, I have no further questions.

THE COURT: Mr. Rosenberg.

MR. ROSENBERG: Your Honor, at an earlier stage in this case the government moved to dismiss the complaint on several grounds, one of which was that the plaintiff had failed to exhaust his administrative remedies by filing a timely administrative claim setting forth the nature of his damages and the amount of his claim and supporting that with documentation of his doctors. Now, at the time the motion was submitted to you, you denied it and you held in your opinion, which is recorded at 354 Federal Sup, I think 1147, that the issue of whether the administrative claim was filed in a timely fashion was a matter of fact and had been controverted by affidavits before you and it would be preserved to trial.

May I suggest respectfully that the plaintiff continue his case to introduce some proof of this essential allegation of his case.

THE COURT: If he wants to he can. If he doesn't, he may rest on what he's put inso far. The government may have to move forward.

I don't remember all the details of it. As
I recall it there was a letter sent. Didn't I say that
I thought that was a timely letter?

MR. ROSENBERG: Your Honor, you held in your opinion--

THE COURT: Do you have my opinion there?

MR. ROSENBERG: Yes, your Honor.

THE COURT: The tenor of my opinion was that the government would have to go forward. "Proof of mailing creates a rebuttable presumption of receipt. The circumstances of March 21, 1971, as it appears on the July 17, 1972 claim, coincide with the date of the covering letter strongly supports the presumption. There is at least an issue of fact and summary judgment cannot be rendered on behalf of the government upon the ground that no claim was made by the plaintiff administratively within two years of the accident. "

So I think the ball is in the government's court now.

MR. ROSENBERG: Your Honor, I agree there is an issue of fact presented as to the administrative claim but at trial there has been no evidence adduced whatever that Mr. Cordaro sought an administrative claim, submitted information to his attorney on the basis of which he completed, signed it or that the claim was signed or that he submitted the claim to the defendant. As you know in our motion to dismiss we indicated by way of affidavit that we had not received the purported administrative claim until July of 1972, past the two year

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Statute of Limitations.

THE COURT: What do you say?

MR. DONOGHUE: Your Honor, it was our understanding that the question of whether or not that claim had been received was a question that would be raised by the government at this litigation, but not a question that we would affirmatively respond to in this proceeding.

THE COURT: Well, I would have assumed that it was understood that the affidavits and the documents previously presented are part of the record. Otherwise you can just reintroduce them, I suppose. Is that what you mean?

MR. ROSENBERG: Your Honor, what I mean is I think there should be some --

THE COURT: Where did I get, for example, the fact there was a March 21, 1971 date of claim? I got that from an exhibit attached to an affidavit. Is that right?

MR. ROSENBERG: That's correct, your Honor.

THE COURT: What is your point, that he should call the secretary of the lawyer so that you can cross examine her?

MR. ROSENBERG: He should call some witness

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 who is prepared to testify that this claim was executed on or about the date that it bears and that it was submitted to the Department of the Interior. Since we have already indicated in our affidavits earlier in this case that we have witnesses who are prepared to testify that this claim was not received anywhere near the date that it bears.

THE COURT: In the interest of justice, I am going to hold that in abeyance and we can have the trial. If that becomes an issue, I will give them some time to present evidence on it. Apparently you are not prepared. Is that right?

MR. DONOGHUE: No, your Honor, we are not prepared to meet that issue.

MR. ROSENBERG: May I have a moment, your Honor?

THE COURT: Yes.

(Pause.)

CROSS EXAMINATION

BY MR. ROSENBERG:

Q Mr. Cordaro, at the time of the accident how fast were you traveling?

A About 15, 20 miles an hour. I don't know exactly. I molook . I don't think I was going too fast.

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Q Mr. Cordaro, approximately how far was your house from the point of the accident?

A Exactly?

Q About two blocks?

A Lent Street is exactly three blocks.

Q About three blocks away from the accident?

A Exactly.

Q You had been driving for approximately three blocks before the point of collision?

A I say where my garage is is two and a half-from my house is three blocks exactly. But where my
garage is is two and a half blocks.

Q Mr. Cordaro, in the two and a half blocks
that you were driving between your house and the collision
did you look at the speedometer of your car?

A No, I no look on it because I know I was no go too fast. It was rain. I was no go fast. I say maybe 15, 20. I just guess. I don't think I was going faster than that.

Q That's your guess, that it was 15 or 20 miles an hour?

A Yes, I say 15 or 20. I don't know.

Q Mr. Cordaro, do you recall giving testimony at a pre-trial examination in this case?

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A Excuse me?

Q Do you remember going to your lawyer's office on July 3rd this year and I asked you questions and you answered them, do you recall that?

A I did it, yeah.

Q Page 28, do you remember my asking you this question, "How fast were you going at the time of impact?"

Answer: "I'd say between 15--I don't know, 17, 20--I don't know, I don't ever pay attention."

Do you remember that?

A Yes. That's what I am saying. I say I don't know how fast I was going, 15, 20.

Q Mr. Cordaro, is that just a guess or do you have any basis for saying--

A I say I was no going faster than that.

THE COURT: Did you have your windshield wipers going?

THE WITNESS: Yes.

Q What was the speed limit on Harrison Street at the time you were driving down it?

A Half a block, what I am, they got the flashing light, yellow. I know I am really go slow there.

Q Doyal know what I mean by speed limit?

A Yes, I do.

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Q Do you know what the speed limit was on Harrison Street, the street that ran from your house to the scene of the accident?

A To tell the truth, I no remember. I never pay attention. I know it's real bad street there, all those blocks. I know I no go too fast there. Too many kids around. I don't go fast.

Q Mr. Cordaro, when you testified that it was a real bad street, can you tell us what you mean by that?

A Because the blocks are real short, It's not really, you know, much far way, you know. It's a lot of kids around.

Q Could you describe what the intersection of Harrison Street and Bement Avenue looked like in 1969?

A What street you say? Excuse me again, repeat, please.

Q You were coming down Harrison Street. Is that right?

A Bement Street.

Q You were coming down Bement Avenue?

A Yes.

Q And at the time of the collision your car struck another car in the intersection of Bement and Harrison. Is that right?

SOUTHERN DISTRICT COURT BERORTERS U.S. COURTHOUSE

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Yes.

Can you describe for the Court today what the intersection of those two streets looks like? Were there any traffic signals?

No. It's on the corner, they got a stop sign there.

Were there any street lights?

They got one light half a block my house, they got a flashing light, like yellow.

Was there any bright white light above the Q street?

> Oh, they got lights, sure. They got a light. A

Were they on at the time of the accident?

I don't know. I don't pay no attention to the light, the light they got. I no remember.

THE COURT: Which part of Mr. Lusardi's car did you hit, the front, the middle or the back?

THE WITNESS: I say about the second door.

THE COURT: Toward the back?

THE WITNESS: Yeah, much to the center.

As you got to the intersection of Bement and Q Harrison, do you remember what was on your left?

> What? On my what? A

Mr. Cordaro, is there a store on the left as

you come down?

- A Yes, a store. There is a store right there.
- Q Is the store pretty close to the corner?
- A Yes, pretty close to the corner, that's right.
- Q Were you familiar with that store? Had you ever been there before, walked by it, driven by it?
 - A Yeah, yeah.
- Q You knew, did you not, that that store was close to the corner and it made visibility very hard coming into that corner, did you not? You knew that it was hard to see at the intersection?
- A That's what I am saying, hard to see. I see over there him right in front of me. That's all I know.
- Q The fact is you never saw the other car until it was in front of you in the intersection. Is that right?
- A I saw it was in the front of me. I say the truth, it was in the front of me.

THE COURT: You mean you didn't see him at all until you hit him?

THE WITNESS: It was real close over there.

I see him just--it was real close. I try to make a stop

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but I no got, you know, the chance to do nothing.

Q Well, I am not sure I remember your answer to the Court's question when Judge Gurfein asked you whether you looked to the left or right before you entered the intersection.

A You look over there but the corner, that corner is bad. I mean all is bad over there.

Q I don't mean in general do you look to the left or right, I mean just before the accident when you were driving down Bement--

- A I looked straight ahead.
- Q You looked straight ahead for traffic, right?
- A I am looking. You see the corners.
- Q Did you look to the left or the right before you came into the intersection?

A I don't look straight like a dummy. You know, I am driving.

Q I am sorry, I don't understand your answer.

Did you look to the left or right before you entered the intersection or did you just look straight ahead?

- A Yeah, I was looking, yes.
- Q Did you look to the left and the right?
- A Yeah, I was looking left and right.

THE COURT: Where did this car come from, your

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you mean?

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left or your right, this other car?

THE WITNESS: My left.

THE COURT: From your left?

THE WITNESS: Yes.

THE COURT: Well, as you approached that street did you look to the left to see if any car was coming?

THE WITNESS: Your Honor, they got the store over there. It's really--

THE COURT: It's a blind spot, is that what

THE WITNESS: That's what I am trying to say,

It come so fast there, it's really bad over there.

Q You know it was a dangerous intersection, didn't you?

MR. DONOGHUE: Objection. Calls for a conclusion of the witness.

THE COURT: That's all right.

A I am driving over there. I am driving over there every day, I don't know how many times, because that's my street, that's where I go all the time.

Q You had seen accidents on that corner before, didn't you?

A Yes. Got a few over there.

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Cordaro-cross

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2 Q You have seen accidents over there since

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A Yes.

your accident?

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Q You know it was dangerous, didn't you?

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A Yes.

way. Is that right?

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Q You knew that a driver coming from the left side couldn't see you coming down Bement Avenue? Is that right?

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A Can't see him. See him in the front.

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Q He can't see you because the store is in the

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A He can't see me.

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Q He can't see you coming down Bement Avenue.

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Is that right?

16 17 A That means I don't see him. What do you mean?

I just see him on the front.

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Mr. Cordaro--

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THE COURT: Let me ask you this: Did you put your brakes on when you came to that intersection?

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THE WITNESS: Your Honor, when I see the car

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it was so fast, so in front of me, I try to pull it --

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THE COURT: Before you saw the car, as you were

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approaching the intersection did you put your foot brake

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on?

THE WITNESS: Yes. I was real slow over there. I try.

Q Mr. Cordaro, you remember at the pre-trial examination, page 71, I asked you this question: "Where was the other vehicle with relation to the stop sign," and you gave this answer: "When I see him he was, I don't know--just see him and it was over there, got house on corner there. Got to be real close before you see him. He can't see because the store there."

Didn't you give that answer in answer to that question?

A I am saying right now I say it's bad corner, yes, but I know he go through over there. If he stop he see me.

THE COURT: Which street is the bigger street of the two streets, the one you were on or the one he came across? Which is the bigger street?

THE WITNESS: The one I am.

THE COURT: The one you were on?

THE WITNESS Yes.

Q Well, Mr. Cordaro, you have been on Harrison Street also, haven't you?

A Harrison Street, 'es.

You have driven on Harrison Street?

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| 1 | Dpa Cordaro-cross 26 |
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| 2 | A Yes. |
| 3 | Q You have driven on Harrison Street |
| 4 | A Stop sign on both sides, that corner and |
| 5 | this corner. |
| 6 | Q Do they have any other signs on that street? |
| 7 | You don't remember? |
| 8 | A I don't remember the corner. I am watch the |
| 9 | stop sign or the light, the danger. |
| 10 | Q Do you remember any signs in front of the |
| 11 | stop sign as you are coming along Harrison Street? |
| 12 | A I no remember that. |
| 13 | Q When you were coming down Bement Avenue, |
| 14 | before you got to the intersection, did you reach for |
| 15 | your brake, did you go for the brake? |
| 16 | A When I see the car I am trying, you know, to |
| 17 | put theI mean I am trying. I no remember exactly. I |
| 18 | put on my brakes, I no put on my brake, I don't know, I |
| 19 | don't want to tell a lie. I don't know. |
| 20 | Q Did your car have an automatic transmission? |
| 21 | A Yes. |
| 22 | Q No clutch pedal? |
| 23 | A No, sir. |
| | |

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What did you do before you entered the intersection? Did you change your rate of speed at all? A You mean when trying to stop? You put the brake. That's the only thing I got on my car, is the brake.

Q Before you entered the intersection and before you saw the other car did you do anything?

A Yes, I tried to put on my brake.

O You tried to what?

A Trying to get on my brake. I no remember.

Putting my brake on, trying, I don't know.

Q Were you reaching for the handbrake?

A The only thing I know I am holding tight on the wheel, that's all I know.

THE COURT: How much did you damage the other car, did you notice?

THE WITNESS: No, sir.

THE COURT: Is there going to be any proof on that?

MR. ROSENBERG: There is no counter-claim on the damage to the government's car.

THE COURT: Not a matter of counter-claim.

It's a matter of trying to estimate the speed of his car based on the damage to the other car. It's on the question of liability.

MR. ROSENBERG: We have no expert testimony on

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that, your Honor.

THE COURT: All right.

Q Mr. Cordaro, sometime after the accident did you have occasion to speak with your insurance agent?

A Yes.

Q And did you tell your insurance agent that your car had been damaged?

THE COURT: Which car?

A My car, yes.

Q Your car had been damaged?

A Yes.

Q Do you remember how soon after the accident you spoke with your insurance agent?

A Yeah, I got in touch with him after I got out of the hospital.

THE COURT: How long were you in the hospital?
THE WITNESS: Seven days.

Q And you were recouperating at home, weren't you? You were at home getting better after you got back from the hospital?

A Yes, I was home.

Q It was while you were at home after the accident that you spoke with the insurance agent?

A Yes.

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| 1 | Dpa | . Cordaro-cross 29 |
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| 2 | Q | You told him about the damage to your car? |
| 3 | A | Yes. |
| 4 | Q | Did you ask him to make a claim? |
| 5 | A | Yeah. |
| 6 | 0 | As to the damage to your car, right? |
| 7 | A | Yes. |
| 8 | Q | Now, that was sometime in late 1969, wasn't |
| 9 | it? | |
| 10 | A | I don't know. |
| 11 | Q | The accident was November 7, 1969, and you |
| 12 | have testi | fied you were in the hospital for about seven |
| 13 | days. So | it was probably sometime in late 1969, wasn't |
| 14 | it? | |
| 15 | A | Yes. |
| 16 | Q | Did there come a time when you saw your |
| 17 | insurance | agent again about the damage to your car? |
| 18 | A | When I see him you mean? |
| 19 | Q | Yes, did you ever see him again? |
| 20 | A | You mean for my insurance? |

You asked him to make a claim? Q

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Asked him to make a claim. He told me, he said, "They no pay for your car."

I go my insurance, that's right.

You talked to your insurance agent-

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24 25 Q Did there come a time when your insurance agent came back to you and said that the government has made an offer. We can get a certain amount of money for the car. Do you remember that?

A Yeah.

Q That was sometime in 1971, wasn't it?

A Yeah.

Q A long time after the first visit.

A A long time after, yes.

Q Do you remember whether you went to the office of the insurance agent or whether he came to your home when you talked about getting money for the car?

A He call me.

Q He called you?

A Yeah.

Q By telephone?

A Yes.

Q And then what happened?

A He called me and wants to know--he say--my car was already fixed. Can't claim for the money for my car now. They told him an offer. I don't remember how much. They say that you can sign the paper.

Q Did he ask you if you would come over to his office to sign the paper?

No.

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Didn't he come to your house with the paper for you to sign?

THE COURT: What are you trying to establish, that he released the government?

MR. ROSENBERG: We have a twofold purpose here: I am trying to establish the sequence of events relating to both the release and the ad ministrative claim. I also want to get some testimony about the circumstances surrounding the signing of the release. In your opinion you also held, denying our motion to dismiss, that the question of the effect of the release had to be preserved to trial; that it could not be determined on papers alone; that there was a question of the intentions of the parties.

THE COURT: All right, go ahead.

Do you recall whether you ever signed a piece of paper which your insurance agent told you would get you the money for the car?

I remember I was going to Mr. Brenner when I signed the paper for the release.

> So we all know what we are talking about--MR. ROSENBERG: I offer this for identification. (Defendant's Exhibit A marked for identification.

Mr. Cordaro, I show you a copy of a piece of Q

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paper which has been marked Defendant's Exhibit A for identification. It bears the words at the top, "Voucher for payment under Federal Tort Claims Act," and I ask you if you have ever seen this paper of a copy of this paper before.

- You know, I got a problem with reading.
- Q Let me draw your attention to a signature which appears below a double line, and below that double line is, "Acceptance by Claim." Do you see that signature?
 - A That's mine.
- Q That's your signature, Frank P. Cordaro, isn't it?
 - A Yes, yes.
 - Q Do you recognize what this is a copy of?
 - A Yes, I signed it, I know that.
 - Q What is this document, do you know?
- A You mean you are trying to say that's for the car, to pay for the car? They paid the insurance for the car.
- Q This is the piece of paper your insurance agent brought to you for you to sign to get money for your car. Is that right?
- A Yeah. I sign the paper for the insurance to get the money.

Where did you go to sign it?

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lawyer.

A I told you, Marshall Brenner. That's my

Is that where you first saw the piece of paper?

Yes.

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this?

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You first saw it in Mr. Brenner's office?

That's right.

Now, before signing this piece of paper Q did you read the statement that appears below the words, "Acceptance by Claimant"?

He read to me, he said--

Someone read it to you?

Yes, he read to me because I don't read too A good.

... Who was it that read the statement?

What do you mean the statement? A

Let me read the words that appear below, "Acceptance by Claimant. I, the claimant, do hereby accept the within-stated award compromise as final and conclusive to me and agree that said acceptance constitutes a complete release by me of any claim by the United States and against the employee of the government whose act or omission gave rise to the claim by reason of the same subject matter."

Did anybody read that to you before you signed

THE COURT: Do you understand what it means?

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That's really not fair. Read the rest.

Did you read the passage here beginning, "Award of claim for appropriate damage to claimant's 1966 Ford four-door suburban when it was in collision with a government-owned 1968 Chevrolet Station Wagon being operated by an employee of the National Park Service on March 7, 1969." Did someone read that to you?

Yes.

THE COURT: Let me say that he really doesn't really understand the technicalities.

Two things happened there, you claim. One is that the car was damaged, your car. The other one that you were hurt, right?

THE WITNESS: The one I get hurt?

THE COURT: You were also hurt, the car was hurt and you were hurt, right?

THE WITNESS: Yes.

THE COURT: When you got the money from the government, what was that for, for the car or for your hurt and for the car, both?

THE WITNESS: I don't know. They send money. What, I don't understand what.

Before you signed this did your lawyer describe to you what this was?

A The only thing the lawyer told me for the car, for fix, you know, the car.

THE COURT: I am going to rule as a matter of law that since the text says property damage, that that's all the release was for, on property damage and not personal injury.

MR. ROSENBERG: The government offers at this time Government's Exhibit A. That's a copy of the release.

THE COURT: That's what I am referring to.

Mark it Exhibit A.

I am governed by New York law. In New York a release is only for what it's intended for. It doesn't go beyond it no matter what words are used.

MR. DONOGHUE: No objection.

Q Mr. Cordaro, let me draw your attention to the release once again and ask you if you can identify the handwriting that appears next to the word "date". Is that your handwriting?

A Yeah.

Q What is the date that you wrote there?

A 24th.

March 24, 1971?

A Yes.

| 1 | Dpa Cordaro-cross 37 |
|----|--|
| 2 | Q That's the date on which you signed this |
| 3 | release. Is that right? |
| 4 | A Yeah, that's right. |
| 5 | (Defendant's Exhibit A received in evidence.) |
| 6 | (Defendant's Exhibit B marked for |
| 7 | identification.) |
| 8 | Q Now, Mr. Cordaro, did there come a time when |
| 9 | you spoke to your attorney, Mr. Brenner, concerning your |
| 10 | claim for personal injuries, the hurt to you, your body? |
| 11 | A Yes. |
| 12 | Q Now, do you remember when you went to see |
| 13 | Mr. Brenner concerning this claim? |
| 14 | A I don't know the date to tell the truth. |
| 15 | Q Was it the same day that you signed the |
| 16 | release? |
| 17 | A No, no, before that. |
| 18 | Q It was before? |
| 19 | A What do you mean, the release of |
| 20 | Q The piece of paper that we have just shown |
| 21 | you that's been marked Exhibit A. |
| 22 | A You mean for the car? |
| 23 | Q Yes. |
| 24 | A Oh, yes, before that. |

That was before?

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A Yes.

THE COURT: What was before?

Q That you went to see your attorney, is that right, to tell him about the injury that you had?

A Yeah, that's right.

Q Now--

THE COURT: We are now dealing with 1971 on Exhibit A. Is that right?

MR. ROSENBERG: That's right.

THE COURT: And the accident happened in

late '69?

MR. ROSENBERG: Yes.

THE COURT: How soon after the accident did you go see Mr. Marshall Brenner?

THE WITNESS: I no remember that date now.

Well, let's fix it in relation to the time you went to see Mr. Brenner to get the money for your car.

Do you remember that after you signed the release, the piece of paper for your car, that sometime after that you got a check, didn't you?

A Yes.

Q You got a check from the United States of America for \$85. Is that right? If you recall.

A Yes, yeah, \$85.

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Q About how much later did you get that check, how many days or weeks after you signed the release?

A I don't know, It was a long time. I don't know.

Q You saw Mr. Brenner and you described to him the injuries that you had. Is that right?

A That's right because I was going to doctor.

Q And what were those injuries? Could you briefly tell us what happened to you? Describe how you were hurt.

A Well, my back, my neck.

Q Do you know what the word cervical means?

A Say that again.

Q Cervical.

A No.

Q Did you tell Mr. Brenner that you were suffering from cervical and low back strain?
Were those your words?

A I just go over there and I tell them my problem, what doctor I go and everything else.

Q You told him the names of your doctors, is that right?

A Yeah.

Q Did he ask you if you would permit him to ask your doctors to describe your injury and the

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medication that they gave you?

A Yeah. He asked me.

Q Did he ask you if he could talk to your doctors?

A You mean, he can talk to the doctor?

Q Didn't he ask you if he could talk to your doctors?

A Yes.

Q Didn't he tell you that after he talked to your doctors he would like you to come back and fill in a claim for your personal injuries?

A Yeah.

Q And didn't you come back to Mr. Brenner's office on a second occasion and sign a claim form for personal injuries? Isn't that right?

A Yeah.

Q Let me show you what has been marked Government's Exhibit B for identification. It's a several page document. The first page bears at the top the words, "Claim for Damage or Injury." Take a look at it and tell me if this is a copy of the claim form that you signed.

A Yeah, that's my signature right here.

Q I don't think counsel can hear you.

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see your lawyer?

A I no remember what day it was. I don't know if it was a Saturday or in the week. I no remember exactly, you know, what day I go there.

- Q Did you ever see him on a Sunday?
- A No, I never see him on a Sunday.
- Q This is a copy of the personal injury claim you signed in this case. Isn't that right?

A Yeah, that's my signature.

MR. ROSENBERG: The government offers Exhibit B in evidence at this time, please.

MR. DONOGHUE: No objection.

MR. ROSENBERG: The complaint has never been filed in this case. It appears as an exhibit to our answer.

THE COURT: I am trying to find out when it was filed.

was begun as a State Court action in Dutchess County and a summons was served on Mr. Lusardi. We removed it to this Court and I was then sent a copy of the complaint by Mr. Brenner. That complaint, to my knowledge, has never been filed. So it appears as an exhibit to our answer.

THE COURT: When it was started in the State Court,
I am looking for that date. Anybody have that date?

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MR. ROSENBERG: The summons was issued in June of '72 and served in July of '72 on Mr. Lusardi.

MR. GRAHAM: No objection.

(Defendant's Exhibit B received in evidence.)

Q Mr. Cordaro, when you came into Mr. Brenner's office to sign this document, was it fully typed as it appears now?

A Yeah.

Q Was anything filled in after you came there?

A I don't know.

Q To the best of your recollection today?

A I know it looked like that, this was like that.

Q Do you recall sceing this document placed in an envelope or deposited for mailing?

A I no remember.

O No recollection?

A No.

THE COURT: Are you going to be much longer?

MR. ROSENBERG: No further questions.

THE COURT: We will take a recess for five minutes and give the court reporter a chance to rest.

(Recess.)

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

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CROSS EXAMIN.TION

3 BY MR. GRAHAM:

Q Now, Mr. Cordaro, do you recall exactly where the accident took place that afternoon?

A What time the accident was?

Q Yes.

A 4:30, quarter to five, I don't know, something like that.

THE COURT: Quarter to five?

THE WITNESS: I know I got to pick up my wife 5:00.

Q Now, did your wife work in the City of Poughkeepsie?

A Yes.

Q You said Bond Clothes?

A Yes.

Q Where is that located in the City of Poughkeepsie?

A Mill Street.

Q Approximately how far from where you were residing that date on Lent Street was it, from Lent Street to where you were going, to pick her up?

A How far is it? Half a mile, three-quarters of a mile. I don't know, something like that.

Q Three-quarters of a mile?

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| 1 | Dpa Cordaro-cross 45 |
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| | THE COURT: How many blocks is it? |
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| 3 | Q Do you recall approximately how many blocks it |
| 4 | was? |
| 5 | THE COURT: Why is that important anyhow? |
| 6 | MR. GRAHAM: Well, I am trying to figure out |
| 7 | why he left so early to pick up his wife. |
| 8 | Q When did your wife generally get through with |
| 9 | work? |
| 10 | A At 5:00. |
| 11 | Q What time would you generally leave to pick her |
| 12 | up? |
| 13 | A I don't know, the same time all the time. I know |
| 14 | I got to be there 5:00 and I go early. |
| 15 | THE COURT: You picked her up every day in 1969? |
| 16 | THE WITNESS: Yes. |
| 17 | Q How long had she worked at Bond Clothing prior |
| 18 | to the time of the accident? |
| 19 | A She work over there a long time. |
| 20 | Q Well, approximately to the best of your memory. |
| 21 | A Seven, eight years I'd say. |
| 22 | Q And when you went to pick her up, as a |
| 23 | general activity you would take the same route, wouldn't |

Yeah, because my garage is on Bement Street.

you?

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That's the easiest way for me to go.

Q You took that route to pick her up going through that particular intersection five days a week. Is that correct?

A I go all the time that way, you know.

Q Approximately how long does it take you to go from where you were residing on Lent Street until you got to Bond Clothing on Mill Street?

A Go over there, that's all they got, stop sign, and nothing else but a stop sign before you reach my house to go over there, that's all. It's one, two stop sign to go over there, over to Mill Street.

Q But approximately how long does it take you, five minutes to get there?

A I don't know. Five, ten minutes.

Q No more than ten minutes, right?

A I don't think so. .

Q So when you say you left at 4:30 or quarter to five, you really don't know what time you left, do you?

A I know I left between 4:30, quarter to five, I say.

THE COURT: Doesn't the accident report show what time it was?

MR. GRAHAM: Yes, your Honor.

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Q Now, Bement Avenue, could you describe how wide the street was in terms of car widths prior to entering the intersection?

- A What street is this?
- O Bement.
- A Oh, Bement Street. It's a little wide. They got on one side, this side here, on my right once in awhile they park a few cars over there, you know, but they got two lanes.
 - Q It has two lanes of traffic?
 - A That's right.
 - Q And alternate side of the street parking. Is that correct?
 - A Once in awhile they park.
 - Q In terms of car widths would you say it's approximately four car widths wide?
 - A How wide is the road?
 - Q Yes.
 - A I don't know. I no count the feet.
 - O ' How wide?
 - A I don't know. I no count the feet, how wide they make.

THE COURT: Well, can two cars pass by if you have a car parked--

THE WITNESS: Well, they got --

THE COURT: Listen first. Then you can answer.

If two cars are parked, one on each side of the street,

can two cars still go by in the middle? Is it that wide?

THE WITNESS: Oh, yeah, room for two cars.

Little tight but they got room.

Q As you approach the intersection where were you in connection with the middle of Bement Avenue? Did you understand my question?

- A When I go at the time of the accident?
- Q Just prior to entering the intersection where was the motor vehicle you were operating in relation to the center of the street?
- A I don't know. You got the store over here-THE COURT: Were you keeping to the right he
 wants to know. Were you on the right side of the street?

THE WITNESS: When I see the car I am trying-I am trying to twist the car. You know, when I see him, I
try to twist the car to get out, you know, of the
accident, no make the accident, you know.

Q You said before in terms of what you did that you tried to stop. Is it your testimony now that--

A I mean, you know it's so fast.

Q But your testimony is now, Mr. Cordaro, that you

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tried to do two things when you observed the other vehicle:
The first thing was to try in some way to slow or stop the
vehicle. Is that correct?

A I am trying to hold it. I seen that car in front of me, I mean I don't know what to do, let's put it this way.

- Q What did you do?
- A What I do? I just hold myself, that's all I did.
- Q What did you do, if anything?
- A I mean he's in the front of me. I mean so close you got no chance. I am trying to stop, I say. I don't know I did it. I no remember.
- Q Well, you remember an accident took place, though, don't you? You remember that?
 - A Yes, sure I remember the accident.
- Q Is it your testimony that as you were coming down Bement Avenue approaching the intersection with Harrison Street, you were traveling on the right-hand portion of the roadway. Is that correct? Yes?
- A I mean what did you say, trying to be on the right?
 - Q Yes, were you on the right?
- A I don't know if I am on the right. I was in the center.

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You were driving on the center of the street?

It was the center of the street when I got to the accident.

Do you understand what I mean when I say before you got to the intersection?

On the left. I go down, I am going south. THE COURT: Are you keeping to the right side of the road?

THE WITNESS: No, no, left side.

THE COURT: You were in the left? What do you mean you were on the left side? You drive to the right, don't you? THE WITNESS: Yes, I am driving.

THE COURT: When you drive you drive on the right side in America, don't you?

THE WITNESS: Yes.

THE COURT: Is that what you were doing?

THE WITNESS: Yes.

THE COURT: So you were on the right side.

THE WITNESS: I don't understand.

THE COURT: The car that came from the other way had to be almost all across the avenue before you hit him. Is that right?

THE WITNESS: You got piece of paper? I mean I don't know.

Didn't you say, Mr. Cordaro, you were driving

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

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on the left? Didn't you say that? You were driving, not the other vehicle, you were: didn't you just say that?

THE WITNESS: I drive, yeah.

Q You were driving on the left side of Bement

Avenue as you approached the intersection of Bement with

Harrison. Is that correct?

A I am going south, right?

THE COURT: Is that a two-way street or one-way?

THE WITNESS: Two-way.

THE COURT: How could you be going on the left?
You would hit somebody, wouldn't you?

THE WITNESS: Yes, I got my side and they come this way. That's what side I am. I am right here. He come over this way. I don't understand.

Q Well, do you recall where you were as you approached the intersection--

THE COURT: You have to draw a diagram. That's the only way you can do it with him.

What's the name of that main street?

MR. GRAHAM: One is Harrison and one is Harrison.

THE COURT: The dotted line here is the center of the street. You are coming along here, right?

THE WITNESS: Yes.

THE WITNESS: Oh, to over here you mean?

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that be?

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THE COURT: No, from here to where you hit him, how much is that distance?

THE WITNESS: I don't know. Ten feet, twenty feet. I don't know.

THE COURT: Well, you said that this is about four cars wide. That's about what, 25 feet or something like that?

THE WITNESS: Three cars.

THE COURT: You say he was half-way across. So that would be about twelve feet. How long was his car?

Well, somebody will have to ask him that and figure it out.

Q Mr. Cordaro, when I ask you the right side or the left side, do you know what I mean?

A Yes. That's my right, that's my left.

Q Indicating your left hand.

A Yeah. When I go down, that's what I say, it's right.

Q Now, describe the traffic on Bement Avenue as you approached the intersection that afternoon.

Let me rephrase the question. If you don't understand what I say, please indicate and I will try again.

How much other traffic was there on Bement

Avenue as you approached the intersection that afternoon?

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- A No car there.
- Q No traffic at all?
- A No traffic.
- Q And as you approached the intersection what did you observe, if anything, as you approached the intersection prior to being in the intersection? Did you observe anything?

A Just drive slow.

THE COURT: I wish you gentlemen would recognize his relative difficulty with English. Instead of saying prior to and all that business, just say before you got there what happened?

- Q What did you see before you got to the point where the two streets crossed, if anything?
 - A What I do?
 - Q What did you see?
- A Oh, what I see? I see the car in front of me.

 THE COURT: Before you got there what did you

 see?

THE WITNESS: That house over there and the store, I am trying to explain for you people, is so close you can't see before you get on the corner. You got to be real close before you get over there. That's what I am trying to explain to you. I don't know, maybe I am wrong.

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did you not?

your testimony?

THE WITNESS: Yes. I am there every day.

THE COURT: Well, you made that trip, very often,

THE COURT: You knew there was a building on the corner there which made it impossible to see until you were

Yes. He was in the front of me, yes.

in the intersection. Is that right? You knew that before?

THE WITNESS: Yeah. It's a real bad street. I know that, your Honor. And it's rain and I am going slow every day there, but it's bad--

THE COURT: The question is: Did you put your brake on and sort of stop before you cross?

THE WITNESS: God, I don't know. It was so fast on the front of me.

THE COURT: I am not talking about this accident, I am talking generally. You go there every day. Do you put your brake on and sort of stop?

THE WITNESS: Yes, I go slow. Try to put my brake on, yeah.

Q On the date of the accident, before you got to the intersection did you slow down?

A I am go slow. It's two blocks and a half
exactly from my house. I am go really slow. I no look at the
speedometer, you know, how fast. It was a rainy day and
I am go real slow. I don't know.

Q When you saw the other car in the intersection were you going at the fastest rate of speed you had driven from the time you left your house until the time you got to the intersection?

A Did what?

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Q Were you going at your fastest rate of speed at that point in time, as you got to the intersection?

THE COURT: That's complicated. How fart is what you want to ask him. He's answered that several times.

THE WITNESS: I don't think I was going faster than that.

THE COURT: When did you have your brakes looked at last before the accident, do you remember?

THE WITNESS: My brake, every year and still the car. I got good brakes.

Q On the date of the accident were the brakes on the car in good condition?

A Yes.

Q How were the tires, if you recall?

A Because I was working in Neptune. I come home and the brakes was all good. My brakes all right.

Q How were the tires on the car on the date of the accident?

A The tires good.

Q And how do you know that?

A Because I see I got good tires. I am get good tires all the time for my car. I got four kids home. I got to feed them. I don't want to kill myself.

Q Did you buy the car new or used when you first

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bought it?

A It's used, I guess, a couple of weeks. They got them just for the people show.

Q You mean it was a demonstrator in the showroom?
A Yes.

Q Approximately how many miles did the motor vehicle have?

A 500, 600.

Q How many miles did it have on it at the date of the accident, to the best of your memory?

A I don't know, 20, 26. I don't know.

Q When you say 26, you mean 26 now?

A Maybe. I don't think maybe it's got them. I don't know. Like now, I don't think I got maybe 42, something like that.

Q Now, do you recall this question being asked in Mr. Brenner's office under oath when we got together before:

" Q As you approached the intersection did you look to your right and to your left?

A Yes, looked right, left, front. All over I am drive.
What you do, watch the back mirror too?"

Were you looking out the back mirror when you came out of the intersection?

A I don't know. I no think so.

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| | Cordaro-cross 59 |
| 1 | DPa . |
| 2 | Q Where were you looking when youcame into the |
| 3 | intersection? |
| 4 | A In front, look at the road. That's what I do |
| 5 | I am driving. |
| 6 | Q How was your eyesight on the date of the |
| 7 | accident? |
| 8 | A My eyes? |
| 9 | Q Yes. Do you have good eyes? |
| 10 | A Thank God so far so good. |
| 11 | Q You don't wear glasses or contact lenses? |
| 12 | A No, sir. |
| 13 | Q And to the best of your knowledge your vision |
| 14 | is 20-20 in each eye. Is that correct? |
| 15 | A Well, I say I got good eyes. I mean I got no |
| 16 | trouble right now. |
| 17 | Q Now, you had traveled over the same route on |
| 18 | occasions when it was not raining, isn't that true, to |
| 19 | pick up your wife? |
| 20 | A Excuse me? I don't understand. |
| 21 | Q You had traveled the route before? |
| | you I travel every day, day and night. |

And you had traveled the route before on

occasions when it was not raining. Is that correct?

A Yes.

Q.

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Q And on these other occasions approximately what speed would you achieve, what speed would you go as you went through the intersection?

A I guess the same speed. I don't think I go more because that street is bad. That street is a real bad street for me. I don't know for somebody else, but for me it is. I no travel fast there.

Q It's your testimony that your speed in the intersection--

A I say 15, 20, 19. I don't think I was go faster than that.

Q It didn't make any difference whether it was raining or not, you generally did the same speed as you went through the intersection?

A Yeah.

Q Well, you testified that you were also watching in your back mirror. Were you doing that as you approached the intersection?

MR. DONOGHUE: I am going to object to the'
question. The quotation that was read from the transcript
was a quotation in which the witness described what he
generally does when he is driving. Mr. Graham is now
saying he testified specifically he was looking out the
window.

THE COURT: He asked him before. I think you have had enough on that. He said he wasn't looking in the back.

Q Now, on occasions before the date of the accident when you--

A Before the date?

Q Before, when you enter the intersection, how many feet or car lengths up Harrison Street could you see to your left?

A I don't know, 15, 20 feet, you know, something like that. Because it's really on the corner, the house.

I don't know. I never measured it exactly.

Q But isn't it true, Mr. Cordaro, as you enter that intersection you can see to your left quite a ways up Harrison Street, isn't that true?

A Yes. You see it when you almost exactly to the corner but you don't see it far back because you got the house.

Q But the house is behind the intersection. Isn't that true?

A No. I think you got to go over there, then you check pretty good how far it is. I don't know how far it is. I no measure. I know it's a bad house on the corner there.

I don't know if you people checking on this. I don't know

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what it is.

THE COURT: What's the main avenue?

MR. GRAHAM: It's Bement and Harrison.

THE COURT: How do you spell Bement?

MR. GRAHAM: B-e-m-e-n-t.

Now, when you first observed the other motor vehicle you were looking straight ahead, is that correct?

> A Yes.

Yes?

I am driving, yes. I see him on the front of me.

Now, before you saw him in front of you and at approximately the same time you entered the intersection did you have occasion to look towards your left?

When I go through I looked the street and everything else.

But you didn't look to your left though?

If you want me to tell like a lie, I look around at everything. I mean I am driving and I look at everything. What you want me to say? I am trying to tell the truth. I don't know what you trying to do to me but I am trying to tell the truth. I say I look at it.

THE COURT: He is trying to find out why you didn't see the car before you hit him.

THE WITNESS: The cars come so fast, your Honor,

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in front of me. I don't know, it's possible--you got to see it. You got to be there to look at it. The thing that happened fast in front of me. The whole thing I see this car in front of me, that's all I see.

Q Approximately how fast, Mr. Cordaro, was the other motor vehicle going?

A I can't tell you how fast it was going.

Q Do you have any idea as to what the speed of that vehicle was?

A No, sir.

Q Dich't you just say it was going fast?

A It's got to be going fast.

Q When you say it's got to be--

A I mean I don't know how fast it was going. The whole thing I see him in the front of me. You got to be there to understand.

Q Do you know of your own knowledge as to whether or not the other vehicle was going fast or not?

A I can't say that. I can't say he was going faster than me. The only thing I see, I am telling you this right now, I see him in front of me. The corner of house there, you see the cars right there. That's all I can tell you.

Q Now, before the accident but that afternoon as you were going down the street and into the intersection, did you

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look in the direction of where the house on the corner was?

A I look every day because you got a lot of kids around there. It's a bad street. Thank Gol, I never got-(No further response.)

Q Were there kids playing this afternoon, the afternoon of the accident?

A It was raining. I don't see any kids around.

Q What was the condition of the pavement in the intersection at the time of the accident?

A Excuse me, I don't understand that.

THE COURT: There has been no claim about the pavement, has there?

Q Did there come any period of time from the time you entered the intersection until the time the cars collided that your vehicle slowed down?

A When I hit him my car stayed right there. It no move for nothing.

Q Before you hit the car.

A Before I hit him. Yeah.

You slowed down?

(No response.)

THE COURT: There was no answer to that.

A I just hold myself. I don't know. If I put my brake, don't put my brake, I no remember, honest and true

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Maybe I put my brake. I don't know what I did.

Q What were the lighting conditions that afternoon at the time of the accident?

A The light? It was getting, I guess, a little dark.

Q Did you have your lights on in the car?

A I no remember. I tell the truth. I no remember if I got the light on.

THE COURT: In November it was dark around five, quarter to five, wasn't it?

THE WITNESS: I no remember if I got the light on.

Q When you tried to put the brakes into action, how did you try to do that, did you have a hand brake, foot brake or both in the car?

A It's automatic. Oh, you mean I got an automatic--you mean power brakes?

Q No. Did you have a foot pedal on the floor which operated your brakes?

A Yes.

Q Did you also have some sort of emergency brake mechanism in the car?

A You got the one when you park, yes.

Q Now, which brake did you try to use?

A I use my regular brake all the time. I no use the

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emergency brake.

- It was not the emergency brake?
- No, sir. I never teach that.
- Do you recall whether or not the other vehicle had its car lights on at the time of the accident?
 - I no remember.
- From the time you first saw the other vehicle until the time the two vehicles collided, approximately how far did your motor vehicle move?
 - I think I was in the center.

THE COURT: What?

THE WITNESS: I don't think my car move at all. I was in the middle of the street.

- And, bang, an accident took place immediately.
- That's all, right there.
- Is it then your testimony that your vehicle didn't mov at all?
 - When I hit him I don't think it moved.

I ECOURT: In other words, you are saying as he was crossing the avenue there you hit him as you approach the intersection?

THE WITNESS: He was running in the center because over there they got the stop sign by the store: When I come down he was in center of the street.

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THE COURT: He was almost across the center of the street when you hit him, right?

THE WITNESS: Yes.

Q So it's your testimony then, Mr. Cordaro, that your motor vehicle didn't move at all?

A No. As far as I know, I am in the center of the street.

Q Did the other motor vehicle move at all prior to the point of impact and after you saw it?

A Yes. The other car is the south corner, let's put it this way.

Q Mr. Cordaro, my question is whether or not--

A What?

Q You first observed the other vehicle when it was in the intersection, right? It was in the intersection where the streets cross, Harrison and Bement?

A When I hit him where the other car was?

Q No, when you first saw the other vehicle. Did you see the other vehicle before you hit the other vehicle?

A Yeah, I see him. I see him in the front of me.

THE COURT: He seen him in the front.

Q He was directly in front of you when you first saw him?

A Yes.

| 1 | Dpa Cordaro-cross 68 |
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| 2 * | Q And did that vehicle move at all from the time |
| 3 | you first saw the other vehicle until the time the two |
| 4 | cars hit? |
| 5 | A Just go straight ahead and you just go |
| 6 | straight, that's all. What do you mean, move? |
| 7 | Q He moved, didn't he, or not? |
| 8 | A Who moved? |
| 9 | Q The other vehicle. |
| 10 | A When I hit him he go the other side of the |
| 11 | street. |
| 12 | Q No, but before you hit him, before you hit him. |
| 13 | A He go straight down. Just go. |
| 14 | Q He was still moving when you hit him? |
| 15 | A Yes. |
| 16 | Q From your left to your right? |
| 17 | A Yeah. He was moving. |
| 18 | Q How far were you from the other vehicle when you |
| 19 | first saw it that afternoon? |
| 20 | A I don't know how far. I don't know. I mean |
| 21 | honestly I don't know how far it is. |
| 22 | Q Was it more than one car length away? |
| 23 | A The thing happened so fast. I don't know. |
| 24 | What I got to tell a lie for? I don't want to tell any lie. |
| 25 | I don't know how far it is. I no go over there and |
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THE COURT: Are you going to be much longer?

MR. GRAHAM: About ten minutes more.

THE COURT: Ten minutes?

MR. GRAHAM: Yes, your Honor.

Q Now, what happened to the positions of the cars, your car and the other car immediately after the cars collided, if anything?

A You mean after I hit him? When I hit him you mean?

Q Yes, what happened to your car and what happened to his car?

A My car is right there in the center there.

As far as I know everything is right there. I can't move.

I see this car, I see him over the other side of the street. I am right there, I never know what happened.

They pick up the car or throw it away. I never know damage, I never know nothing.

Q The motor vehicle you were in, did it move at all after the two cars collided while you were still in it?

A No. It stay still. It was right there. You trying to say it twisted, go this way or that way?

O Yes.

A No, it was straight.

| 1 | Dpa Cordaro-cross 70 | | |
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| 2 | Q So the position of your vehicle was the same | | |
| 3 | A Yes. | | |
| 4 | Q the same following the collision | | |
| 5 | A Move four inches, five inches, this way, that | | |
| 6 | way, I don't know. I know I am facing south. I go south; | | |
| 7 | still am facing south. | | |
| 8 | Q The other vehicle you said moved after the two | | |
| 9 | cars hit. Is that correct? | | |
| 10 | A Yeah, the other car, I see him over the other side | | |
| 11 | Q Where did the other vehicle move to, right after | | |
| 12 | the two cars collided? It came to rest didn't it? It came | | |
| 13 | to a point where it stopped? | | |
| 14 | A Yes. | | |
| 15 | Q Where was that in relation to where you were? | | |
| 16 | A You got a piece of paper? Maybe I can show you. | | |
| 17 | THE COURT: Give him a piece of paper. | | |
| 18 | Q Was it to your right? | | |
| 19 | A This side. | | |
| 20 | Q Now, you were approaching the intersection from | | |
| 21 | here, right? | | |
| 22 | A Yes. | | |
| 23 | Q Would you please put an X where the two cars | | |
| 24 | collided? | | |

I am right here.

Indicating approximately the middle of the road.

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2 | Is that correct?

A Yes. Still I am go south and I am still south.

This car, as far as I know, is right here, on this corner.

Q If you know, how did that vehicle get in that corner?

A I don't know.

THE COURT: That's after the accident?

MR. GRAHAM: Yes.

THE COURT: I guess he pushed him.

THE WITNESS: I don't know why. I am right there and the other car is over there.

Q Now, what signal or warning device, if any, did you hear just before the cars collided?

- A Excuse me, I don't understand. After?
- Q No, before the cars collided did you hear anything?

 THE COURT: Did you hear any horn blowing?

 THE WITNESS: No.
- Q Any screeching of tires or anything?
- A I no hear nothing.

Q Now, what part of your vehicle came into contact with what part of the other vehicle, to the best of your memory?

A What part?

Q Yes, what part of your car hit what part of the

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other car?

A I don't know. Behind the door, the second door, I gues. I don't know.

Q Are you indicating the rear portion of the other car?

A I don't know. I think I hit him on the center.

Q What part of your car was damaged as a result of the collision?

A Would you believe I don't know? I don't know if it was the right. It was all the front, you know, but on the right I think it was.

Q On the passenger side of your vehicle?

A Yeah, I think so.

Q Now, you indicated before, Mr. Cordaro, that after you saw the car you tried to turn your steering wheel before the two cars collided. Is that correct?

A Maybe I say I was trying to do. I mean so
fast you don't know what happened. When you see danger I guess
nobody knows what happened.

Q Nobody is asking you to guess. Did you or did you not, after you saw the car, do anything in connection with your steering wheel?

A I don't know. I no remember.

| 1 | Dpa | Cordaro-cross 73 |
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| 2 | Q | Now, immediately after the accident where did |
| 3 | you go? | |
| 4 | A | I guess they called the ambulance. The ambulance |
| 5 | come over. | |
| 6 | Q | Where did you go, Mr. Cordaro, immediately after |
| 7 | the accider | nt took place? |
| 8 | A | What do you mean, where did I go? |
| 9 | | THE COURT: Did you get out of the car? |
| 10 | | THE WITNESS: No. |
| 11 | | THE COURT: Did the other driver come over to |
| 12 | your car? | |
| 13 | | THE WITNESS: He come over. |
| 14 | | THE COURT: Then a cop came. |
| 15 | | THE WITNESS: Then a cop came. |
| 16 | | THE COURT: Then the ambulance came and you still |
| 17 | stayed in your car? | |
| 18 | | THE WITNESS: Ambulance came and they send me |
| 19 | to the hospital. | |
| 20 | Q | You testified before that every block from |
| 21 | your house has a flashing yellow light. | |
| 22 | A | I say one. |
| 23 | Q | One block? |
| 24 | Α . | Yes. |
| 25 | Q | Where was that block located? |
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A I don't know that street now, the name of the street now. Land Street, then the second one. I don't remember the street where the light is. It's half block from my house they got a light there.

Q You indicated, when the Judge asked you a question before, that because of the house on your left there was a blind spot. Now, what do you mean?

That street is bad. I no got to say it's light.

Q Is it true, Mr. Cordaro, that when you are in the intersection, by looking to the left you can see a considerable distance up Harrison Street. Isn't that true?

A No.

Q Why isn't that true?

A I see him on the front . I am telling you.

Q Approximately how many feet--

A I don't know.

Q --back from the road, which is Harrison Street, is the house that you are referring to?

A I don't know. I don't measure it. I don't know how far it is. I mean I never go over there and measure, go measure how far it is.

Q But approximately how far can you see once you are in the intersection by looking to your left, you can see right up Harrison Street, can't you?

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A How long I been driving?

Q No, how long did you have a license to drive in the State of New York?

A Oh, I think I got them, I say, nine, ten years, something like that.

Q And how old were you at the time of the accident?

A How old I am?

Q At the time of the accident.

THE COURT: Tell us how old you are now and we will figure it out.

THE WITNESS: 36. I will be going for 37.

THE COURT: So four years ago you were 32.

Q How old were you when you got a license to operate a motor vehicle in the State of New York?

A I don't know. Nine, ten years.

Q You were nine or ten years old when you got a license?

A No, I say nine or ten years I got them.

Q Didn't you say before 19? I thought you said
19.

THE COURT: He is saying he is 36 years now.

About ten years ago he got a license when he was about 26.

Is that about right?

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THE WITNESS: I'll say.

Q Now, at the time of the accident had you been convicted of any violations with regard to the operation of the motor vehicle? Did you have a clean driving record?

A You mean an accident you mean?

Q No. Had you been found guilty of any traffic violations prior to the time of the accident?

A No, sir.

Q So you had a clean license. Is that correct?

A Yes, sir.

MR. GRAHAM: I have no further questions.

THE COURT: You may step down.

(Witness excused.)

THE COURT: Anything more for the plaintiff?

MR. DONOGHUE: No more from the plaintiff.

THE COURT: The plaintiff rests.

The defendant, United States, is going first?

MR. ROSENBERG: Yes, your Honor. Before we proceed we would like to move under Rule 41B to dismiss the complaint and I'd like to know ifyou will entertain a motion now.

THE COURT: I will reserve decision on it. You go ahead.

MR. ROSENBERG: First of all, your Honor, the

administrative claim, which is a jurisdictional claim for suit, must be filed within two year after the accident.

THE COURT: I have already ruled I would allow the proof to be opened up for that. If I find liability is likely then I will let them put in some proof about it.

MR. ROSENBERG: Let me indicate the outline of my argument, if I may. Defendant's Exhibit B is a copy of the administrative claim which Mr. Cordaro testified he signed and which was the claim for his personal injuries.

Mr. Cordaro has not testified as to the time when that claim was submitted, although your Honor has indicated at an earlier stage today that you will accept the affidavit of the former secretary of Marshall Brenner--

THE COURT: Unless you insist she come here and you have a right to cross examine her obviously. Do you want her here?

MR. ROSENBERG: I think that our motion can be granted on the basis of the proof which I am going to outline at this time.

THE COURT: Go ahead.

MR. ROSENBERG: Mr. Cordaro testified that he signed that claim form at Mr. Brenner's office. He further testified that although he didn't remember the exact day when he went to Mr. Brenner's office to sign it, he did say

clearly that it was not a Sunday. That claim form is dated March 21, 1971 and I will draw the Court's attention to a desk calendar or we can all take judicial notice--

THE COURT: Everybody makes a mistake on a date.

That doesn't prove it's a Sunday.

MR. ROSENBERG: I would also like to indicate, your Honor, that the claim for which Mr. Cordaro signed and which he testified bore the accompanying and supporting medical documents which are attached to Exhibit B. That claim form includes documents of the date of December 15, 1971. They are the medical information furnished to Marshall Brenner and on the basis of which he prepared the claim. We can say this inferentially since Mr. Cordaro is not in a position to say that he had cervical and low back strain. He said his back hurt. On the other hand, the supporting documentation goes through December 1971.

THE COURT: Suppose the lawyer got a telephone call, called the doctor or something.

MR. ROSENBERG: IF you will turn to the accompanying documents attached to Exhibit B, which is a copy of the claim form, you will see those supporting documents date from December 15, 1971.

THE COURT: I understand that. But how does that prove that he didn't call a Doctor Jacobs or a

SOUTHERN DISTRICT COURT REPORTEDS U.S. COURTHOUS

2 Doctor Emrick before March?

MR. ROSENBERG: He could well have called them in March of 1971 but he could not have submitted this claim form in March '71, a copy of which he allegedly resubmitted in July '72 when we first got it, if it bore copies of correspondence from December of '71.

THE COURT: I am assuming that the claim that was filed on March 21, '71, did not contain these exhibits. I have been proceeding on that basis.

MR. ROSENBERG: The testimony of Mr. Cordaro is that he signed this claim form and it was not a naked claim but it was combined with attached medical documents.

THE COURT: I don't give any credence to his testimony at all on a subject like that. The only thing, if you had an affidavit from that secretary, and I don't know, did she say there were exhibits attached?

MR. ROSENBERG: No. It just says, "Per yours of April'71--"

THE COURT: She enclosed a claim?

MR. ROSENBERG: Two copies of claim form.

THE COURT: How do you explain that letter

of March 21, 1971?

MR. ROSENBERG: There is no letter of

CHERRY CHERRICA COURT DEPORTERS, U.S. COURTHOUSE

March 21, 1971. Much of this will require proof from one of our witnesses. But if I can anticipate, the first correspondence we received indicating there was a claim for personal injuries was a letter dated March 25, 1971, from Marshall Brenner. It refers to claims allegedly sent in at some prior date, although not indicated. We have never received any earlier letter, that is a letter dated prior to March 25, 1971, which presumably would have been the cover letter enclosing the earlier claim form.

THE COURT: Didn't she in the affidavit have a cover letter?

MR. ROSENBERG: The Department of Interior sent Mr. Brenner a letter dated April 9, 1971 saying we didn't receive the forms by his client. We heard nothing from July '72 when we received a second letter indicating that claim forms had been submitted and here are copies.

THE COURT: What did she say in the March 21st letter? Was there such a letter? Do you deny there was a March 21, '71 covering letter?

MR. ROSENBERG: Her letter says that I sent a letter dated April 9, 1971 to the Department of the Interior. 'at was the affidavit submitted in opposition to our motion to dismiss. We never received that letter.

THE COURT: There was a date of March 21st, which

Exhibit B.

MR. ROSENBERG: I can show you copies of letters which have not been marked for identification.

THE COURT: Where is her affidavit, has anybody got that?

MR. ROSENBERG: I have a copy. It's the last page of Mr. Brenner's affidavit.

(Handing.)

(Handing.)

THE COURT: What do you say, the fact that the Exhibit B contains a statement that the date of claim is March 21, '71, and that the reference in the letter or the affidavit was to a letter of Brenner of March 25, '71, was a significant thing? The four day difference, is that what you're pointing to?

MR. ROSENBERG: No. Our contention is somewhat complicated but if I can strip it down to the bare essentials, we are saying that the only communications we received from the plaintiff's attorney, Marshall Brenner, were a letter dated March 25, 1971, sent to us by certified mail.

THE COURT: Where is that letter, do you have it?

MR. ROSENBERG: Yes, your Honor.

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THE COURT: In here he says, "After having submitted claim forms on behalf of my client, Francesco Cordaro, who sustained personal injury in the accident of November 7, 1969."

MR. ROSENBERG: We never received the earlier claim forms and we wrote him a letter.

THE COURT: He says he submitted them. Why don't you put him on the stand. You are entitled to do that.

MR. ROSENBERG: My co-counsel, Dennison Young, spoke with Mr. Donoghue yesterday, and we were led to understand that Mr. Brenner, whois still the attorney of record, was going to be here.

MR. DONOGHUE: I object to that, I never stated Mr. Brenner would be here today. I submit if counsel for the government wants to interrogate Mr. Brenner or Mr. Brenner's secretary who served at the time that the affidavit was executed, at the time the affidavit of

was done, I submit the government has an opportunity to subpoena them. I have no objection for a continuance. But your decision below, your earlier decision said that the presumption of the affidavit is a rebuttable So I had a presumption coming into this trial this morning. If the government wished to rebutt it they had an opportunity to ask for the presence of witnesses.

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MR. ROSENBERG: I think we had a right to rely on the fact that counsel of record--

THE COURT: I think you are being very technical, Ar. Rosenberg, I really do. You are dealing with a citizen's claim against the United States and the United States has to do justice. If it's transparently clear that the requirements of the Federal Torts Calim Act were not followed, that's one thing. But if there is any substantial doubt about it I certainly would have to resolve it in favor of the injured party. That's why I don't understand all of this really devious technicality.

MR. ROSENBERG: The gist of our argument is that the first time we ever received a claim was under cover of a letter of July 14, 1972.

THE COURT: I understand that's your claim. But here we have prima facie evidence, whether you have it or not, that an allegedly reputable member of the bar sends a letter in which he previously sent somebody--maybe he sent it to the wrong place, I don't know--a claim relating to a personal injury. Now, what could be more explicit than that?

MR. ROSENBERG: That's perfectly clear but I fail to understand how his claim of March 21, 1971, sent either under cover of a letter of March 21st or a letter of April 9th could have included copies of correspondence dated

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December of that year.

THE COURT: Who says it did?

MR. ROSENBERG: Well, I take it that his letter of July 1972 when he states that he is submitting copies of claims formerly submitted is a reference to that very fact.

THE COURT: You can't take it because he is not that silly. I mean I can't assume a member of the bar is stupid enough to say that he sent you something

December 15th, a year earlier. Why would he do a thing like that? Otherwise he is getting himself disbarred, isn't he?

MR. ROSENBERG: There is a second branch to our motion. We contend based on the testimony that has already come forward this morning the plaintiff has, first of all, failed to establish that the government's driver acted at all negligently in this accident. All that we know is he was first seen in the middle of the intersection and the plaintiff's--

THE COURT: I told you I would reserve on that.

Put your witnesses on and we will decide at the end of the case. It's now ten minutes to one. How long will you take?

MR. ROSENBERG: Our entire case should take no

more than two lars.

THE COURT: Two hours is too long because I have got a 3:00 injunction hearing which I have scheduled and I would like to be finished by 3:00 if we resume at 2:00. Is it possible?

MR. ROSENBERG: We have one extremely short witness and one moderately short witness, the government driver. I can't speak for the cross examination.

THE COURT: You ought to be able to do it.

MR. ROSENBERG: On direct it would be forty-five

THE COURT: Getback at five minutes to two and we will see if it can be done.

MR. GRAHAM: Since the plaintiff in this case has rested it seems to me regardless of the question to negligence. I would join in the--

THE COURT: Just put a formal motion on. What are your motions?

MR. GRAHAM: Well, initially that they haven't established most importantly freedom of the contributory negligence of the plaintiff. The only testimony that's been elucidated in support of the plaintiff's case is, at best, abundantly filled with inconsistencies and it's unbelievable among other things.

Can you briefly describe for the Court your duties?

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Q

A We handle the general problems for the various bureaus of the Interior Department; namely,
Indian affairs, Bureau of Mines, National Park Service, and so forth. Among those duties specifically I have been handling the tort claims for the 18 northern states.

Q Have you handled any aspects of the case which we have today arising out of the claim by Francesco Cordaro?

- A Yes, I was in this case from the inception.
- Q When was that, sir?
- A Well, the property damage claim about tendays after the accident.
- Q May I ask you whether you have ever received any correspondence from Marshall L. Brenner?
 - A Yes, sir.
- Q When was the first correspondence that you received from Mr. Brenner? Can you recall when you first received correspondence from Mr. Brenner?
- A On March 30, 1971 we received a letter dated March 25, 1971, which was the first correspondence received from Mr. Brenner. This was not a claim.

MR. ROSENBERG: I would like this marked as Defendant's Exhibit C for identification, please.

(Defendant's Exhibit C marked for identification.)

Q Mr. Thornton, I show you Government's

Exhibit C for identification and ask you if that is the

letter which you have just described.

A Yes, sir.

THE COURT: Any objection?

MR. DONOGHUE: I have no objection to the receipt of this document in evidence.

THE COURT: Received.

(Defendant's Exhibit C received in evidence.)

THE COURT: Let me ask a question, if I may,

Mr. Thornton. When you received a letter which says,

"After having submitted claim forms on behalf of my client,

did you look to see whether claim forms had been submitted?

THE WITNESS: Yes, your Honor. We were corresponding with an insurance company, United Security Insurance Company, and that's a little equivocal. We didn't know whether he submitted claim form himself or whether he was referring to the forms which we had already received from the insurance company.

THE COURT: But you didn't write him back and say what claims?

THE WITNESS: Eventually I did but not immediately. What I did in response to that letter was write him a letter on April 1st. I don't know whether

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counsel has a copy of that.

Do you, counsel?

MR. ROSENBERG: I do, your Honor. Perhaps we should mark this as Defendant's Exhibit D for identification (Defendant's Exhibit D marked for identification.)

Mr. Thornton, I show you Defendant's Exhibit D for identification and ask you if that is the letter that you sent in response to Mr. Brenner's letter of March 25th.

Yes, it is. It's signed by William Redmond, A Regional Solicitor but in the left-handcorner you will see my name in type.

You drafted this letter?

Yes.

Did you send anything to Mr. Redmond under cover of this letter?

Standard Form 95, which is the standard form under the Federal Tort Claims Act.

Let me draw your first attention in Mr. Brenner's letter of March 25, 1971, in which he says, "After having submitted claim forms on behalf of my client, Francesco Cordaro, who sustained personal injuries in the accident of November 7, 1969, I have finally learned to whom I should address correspondence in an attempt to get this matter settled." Let me ask you, as of the time you sent

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Mr. Brenner the claim forms on April 1, 1971, had you received a claim on behalf of Mr. Cordaro for personal injuries?

No, sir.

When was the next occasion after your letter of April 1, 1971, when you heard from either by personal visit, telephone call, or letter, from Marshall Brenner.

We heard on July 17, 1972, by a letter dated July 14, 1972.

(Defendant's Exhibit E marked for identification.)

Mr. Thornton, & show you what has been marked as Defendant's Exhibit E and ask you if that is the letter which you received from Marshall Brenner?

> Yes, it is. A

Now, did you receive anything under over of this letter of July 14, 1972?

Yes, sir.

And what was that?

As enclosures thereto was a claim form, Standard Form 95, dated March 21, 1971, and signed by Francesco P. Cordaro. The date stamp of our office shows that it was received on July 17, 1972, the same date as the covering letter.

In addition there were--

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in evidence.

THE COURT: I would like to see it if you don't

mind.

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MR. ROSENBERG: No, your Honor. May I turn over Mr. Thornton's official file?

THE COURT: Yes.

MR. ROSENBERG: All right.

(Handing.)

(Defendant's Exhibit F marked for identification.)

THE COURT: All right.

(Defendant's Exhibit G marked for identification.)

Q Mr. Thornton, have you caused a search of the files of the Department of the Interior to be made with respect to the personal injury claim of Francesco Cordaro?

A You are referring to our office?

Q Yes.

A Yes.

Q And what has your search of the files disclosed with respect to his personal injury claim?

A Well, that there is no record of any claim having been filed prior to the letter dated July 14, 1972, by Mr. Brenner.

THE COURT: But I am interested in after your letter of July 17th in which you asked him to give you some proof of filing, did he reply, Mr. Brenner?

THE WITNESS: No, sir.

THE COURT: He never did?

THE WITNESS: No, sir.

Mr. Thornton, have you spoken with anyone at Hyde Park or Vanderbilt Mansion concerning the claim of Mr. Cordaro for personal injuries?

A Yes, sir.

Q And what, if anything, --first can you tell us who you spoke with?

A Mr. Lusardi who, I believe, is familiar with the files. I asked him if he had gone through the files and whether he had found anything with respect to this claim. In addition I went over to the National Park Service Regional Offices yesterday and I searched their files personally and found nothing. Prior, of course, to the letter we referred to of July 17, 1972.

Q Let me show you what has been marked for identification as Defendant's Exhibit G and ask you if you have ever seen that piece of paper or a copy thereof before?

A No, sir.

O Would you describe Defendant's G very briefly.

A Well, it purports to be a letter addressed to the Department of Interior, Philadelphia, attention Regional Solicitor, referencing this claim, the Cordaro

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claim. It says, "As per yours of April 1, 1971, enclosed find claim forms re the above matter. I would appreciate hearing from you per mine of March 25, 1971."

Q Did your office receive that letter?

A No, sir.

Q Let me just draw your attention briefly to the address on Defendant's Exhibit C, which is Mr. Brenner's letter of March 25, 1971, and I ask you to compare the address in Exhibit C to the address---

THE COURT: I can do that myself. Put it in evidence and then I will do it.

MR. ROSENBERG: Let me offer Exhibit G in evidence at this time.

THE COURT: Exhibit what?

MR. ROSENBERG: G, the letter of April 9, 1971.

THE COURT: Any objection?

MR. DONOGHUE: No objection.

THE COURT: Received.

(Defendant's Exhibit G received in evidence.)

THE COURT: According to this he never received your letter of April 1st. Is that right? No, he says he did get it.

MR. ROSENBERG: No further questions.

| 1 | Dpa Thornton-cross 96 |
|----|---|
| 2 | CROSS EXAMINATION |
| 3 | BY MR. DONOGHUE: |
| 4 | Q Mr. Thronton- |
| 5 | THE COURT: Excuse me for just a minute. I |
| 6 | want to get the scope of this thing. How many letters a |
| 7 | day would you say you get in your Northern Region? |
| 8 | THE WITNESS: I'd say 20 to 30 letters, your |
| 9 | Honor. |
| 10 | THE COURT: That's to your section? |
| 11 | THE WITNESS: That's to the Regional Solicitor's |
| 12 | Office. |
| 13 | THE COURT: How about to the whole outfit, a coupl |
| 14 | of thousand a day would you say? |
| 15 | THE WITNESS: The Park Service, you mean their |
| 16 | Regional Office? |
| 17 | THE COURT: Yes. |
| 18 | THE WITNESS: I would have no way of judging. |
| 19 | 400, 500, to 1,000. |
| 20 | THE COURT: Is your mail routed through a |
| 21 | mailroom? |
| 22 | THE WITNESS: Delivered directly to us. |
| 23 | THE COURT: By the Post Office? |
| 24 | |

THE WITNESS: Yes. Comes in a bundle usually.

Mr. Thornton, I must have missed this on

Regional Solicitor's Office been confronted with a claim

Have you ever in your experience with the

Per day, yes, sir.

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| 1 | Dpa Thornt n-cross 99 |
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| 2 | pre-claim files that you might maintain? |
| 3 | A I had the secretaries do this, yes. |
| 4 | Q But you didn't search all the other files? |
| 5 | A No. sir. |
| 6 | Q You asserted that you searched the files of |
| 7 | the National Park Service Field Office. Where is this |
| 8 | located? |
| 9 | A In the same building we are in. |
| 10 | Q And how many files do they have? |
| 11 | A It appears like four drawers of a file cabinet. |
| 12 | Q You searched each and every file? |
| 13 | A No. I pull out the file from Hyde Park referring |
| 14 | to Cordaro, Lusardi and looked through that. |
| 15 | THE COURT: Which Hyde Park? |
| 16 | THE WITNESS: Hyde Park, Vanderbilt, and that's |
| 17 | where this vehicle was assigned. It was a federal vehicle. |
| 18 | Q Mr. Thornton, is it possible that a claim could |
| 19 | be received and erroneously filed? |
| 20 | A Say that again, please. |
| 21 | Q Is it possible that a claim could be received |
| 22 | by your office and erroneously filed? |
| 92 | by your office and is possible. |

MR. ROSENBERG: Your Honor, I want to offer in

MR. DONOGHUE: I have no further questions.

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evidence what has previously been identified as Defendant's Exhibit D. Mr. Thornton's reply to Mr. Brenner dated April 1, 1971.

MR. DONOGHUE: No objection.

THE COURT: We have it in evidence already.

MR. ROSENBERG: I am sorry.

I have no questions on redirect, your Honor.

THE COURT: Thank you, Mr. Thornton.

(Witness excused.)

THE COURT: Next witness.

MR. YOUNG: Government calls Mr. Richard

Lusardi.

RICHARD LUSARDI, called as a witness on his own behalf, after being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. YOUNG:

- Q Mr. Lusardi, will you state your address?
- A It's R.D. 1, Box 251, Elizaville, New York.
- Q Explain to the Court where you work and please describe your duties.
- A I work at the sites of the Roosevelt home and the Vanderbilt National Historic site in Hyde Park, New York. Duties are those pertaining to law enforcement of the

1 Lusardi-direct Dpa 101 park rules and regulations as well as state laws and local 3 laws. Are you a guard at the park? Q Among other things, yes, sir. 6 Do your responsibilities require you to drive an 7 official vehicle? 8 Yes, it does. 8 Extensively? 10 Yes. 11 Within authority of your responsibilities were 12 you authorized to drive a vehicle that was involved in an 13 accident on November 7, 1969? 14 Yes, I was. 15 Do you recall that accident? 16 Yes, I do. 17 Do you recall where it was? 18 It happened within the City of Poughkeepsie at 19 the intersections of Harrison Street and Bement. 20 Can you describe for the Court where you were 21 driving and for what purpose? 22 I was returning from the Dutchess County Highway 23 Department en route back to the Vanderbilt National Historic 24 site. 25 And where were you going?

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A I was returning back from--I was going to the Vanderbilt National Historic site.

THE COURT: That's on the river?

THE WITNESS: Yes, sir.

THE COURT: You were going west?

THE WITNESS: Yes, sir.

Q You left the Vanderbilt mansion and the were going--

A I left the Vanderbilt mansion as per orders of the Superintendent to pick up some materials for him at the Highway Department.

Q The Highway Department?

A Right.

Q In Poughkeepsie?

A In Poughkeepsie.

Q It was on your return from the Highway

Department to the Vanderbilt mansion that you were involved
in this accident?

A That's correct.

MR. YOUNG: I'd like to offer to the Court at this time and have identified as a government exhibit an area map of Poughkeepsie. It will help expedite the whole affair.

(Defendant's Exhibit H marked for identification.)

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MR. YOUNG: This is the map taken from the Court file that was introduced at the hearing before Magistrate

Jacobs.

THE COURT: Haven't you ever seen that before?

MR. GRAHAM: No, your Honor.

THE COURT: Mr. Graham, haven't you ever seen that before?

MR. GRAHAM: Well, I saw it on the desk, part of it.

THE COURT: I would appreciate it, if you have seen

it, to either object or not object.

That's what I thought. Received in evidence.

(Defendant's Exhibit H received in evidence.)

THE COURT: I am telling all counsel to do their studying at home and expedite the trial.

Q I'd like the witness to look at that portion of the map that depicts the City of Poughkeepsie, and wish to note for the Court there are some markings on it in black ink, and ask the witness to describe, one, what those markings are.

A The markings indicate the route of travel from the Vanderbilt Estate to the Highway Department. Then the return back to the intersection of the accident.

THE COURT: All right.

Q Will you describe for the Court the route you took down through Poughkeepsie?

THE COURT: What do I care about that?

MR. YOUNG: Because the route he took back was a deviation from that route and that is one of the contentions of the plaintiff, that he didn't have to take that route and therefore we may have been off doing something else.

THE COURT: I am not interested in how he came.

Was that a short way to go back to your

station?

THE WITNESS: What had happened prior to that time there was a fire disrupted the city area proper the day before--

THE COURT: In any event you were still on official business?

THE WITNESS: Yes.

THE COURT: It was not a big detour but it was a way to go through?

THE WITNESS: Yes.

THE COURT: All right, that's enough on that.

- Q Do you recall what the intersection looked like at the time of the accident?
 - A It was raining that night.
- Q Do you recall the locations of the streets? Do you have a memory of what the streets looked like that you

intersection. This is Bement looking north.

THE COURT: And this is looking west, this way? THE WITNESS: That's right. I was approaching

| 1 | Dpa Lusardi-direct 106 |
|----|---|
| 2 | from the grocery store side. |
| 3 | THE COURT: You were next to the grocery store, |
| 4 | all right. |
| 5 | Q You were traveling west? |
| 6 | A Yes. |
| 7 | Q On Harrison? |
| 8 | A Yes. |
| 9 | Q Do you recall the driving conditions at the time? |
| 10 | A It was a heavy rain and it was dark out at the |
| 11 | time. |
| 12 | Q Did you have your wipers on at the time? |
| 13 | A Yes, I did. I had them on full speed. Lights |
| 14 | were on at low beam. |
| 15 | Q About how fast were you traveling down |
| 16 | Harrison Street? |
| 17 | A Approximately 15 miles an hour. |
| 18 | MR. GRAHAM: Could you speak up just a little. |
| 19 | I am having trouble hearing you. |
| 20 | THE WITNESS: All right. |
| 21 | Q About 15 miles per hour? |
| 22 | A Yes. |
| 23 | THE COURT: Was there a stop sign there? |
| 24 | THE WITNESS: At the intersection, yes, there |
| 25 | is, sir. |

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| 1 | Dpa Lusardi-direct 107 |
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| 2 | THE COURT: Did you stop? |
| 3 | THE WITNESS: No, I didn't. |
| 4 | Q At the time of the accident did you see the stop |
| 5 | sign before you entered the intersection? |
| 6 | A No, I didn't. |
| 7 | Q Did you know there was an intersection there? |
| 8 | A No. |
| 9 | Q When you entered the intersection about how |
| 10 | fast were you traveling? |
| 11 | A Approximately the same rate of speed. |
| 12 | Q And that is? |
| 13 | A Approximately 15 miles. |
| 14 | Q Did you see any other cars approaching before |
| 15 | the accident occurred, any other cars coming at you from |
| 16 | either direction on the sides? |
| 17 | A Not at the time. |
| 18 | THE COURT: Did you look to the right or |
| 19 | left? |
| 20 | THE WITNESS: As I approached the intersection |
| 21 | I caught a light or beam of light coming at me. |
| 22 | Q Where was the light coming from? |
| 23 | A Approximately 45 degree angle from my right. |
| 24 | |
| | Q From your right? |

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Q Why don't you just describe for the Court exactly what happened the moment after you saw that light?

A Driving down Harrison Street, which looked like one continuous street, I observed a beam of light or headlights at about a 45 degree angle. I realized that a vehicle was then approaching me on my right side and I applied the brakes and then pulled to the left. At that point is when Mr. Cordaro's vehicle hit mine.

Q You say you stepped--

THE COURT: He must have done the same. He says
he hit you with his right. He must have swerved to the
left. He didn't meet you head-on.

THE WITNESS: No.

- Q He hit you on the right side of the car?
- A Right side of my vehicle was damaged.

THE COURT: I understand that but he hit you with his right side, which means he was turning left?

MR. YOUNG: I don't think that was the testimony, your Honor.

THE COURT: That's what he testified.

MR. YOUNG: I think it was virtually straight on.

Will you stipulate?

MR. DONOGHUE: No, your Honor, if we may, we did not

wrong.

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introduce the one photograph I have which demonstrates that the left front of Mr. Cordaro's car was the portion that was damaged.

THE COURT: He testified to the right. It's

Q How did he hit you?

A To the best of my recollection it was with the front of his vehicle.

Q About how far into the intersection were you at the time of impact?

A I guess I was well into the intersection at that point.

THE COURT: You were where?

THE WITNESS: Well into the intersection.

THE COURT: Where did you end up after the accident, where was your car?

THE WITNESS: Almost completely past the intersection. Just in front of the stop sign, on the other side of the street. More towards the center of the street there.

- Q Did you see any stop lights?
- A No.
- Q Or any yield signs at that corner?
- A No, not at that intersection.

| 1 | Dpa Lusardi-direct 110 |
|----|---|
| 2 | Q You testified you did not see a stop sign. |
| 3 | A Yes, sir, that's right. |
| 4 | Q At the time you testified and the plaintiff |
| 5 | testified that it was raining and it was dark. Were there |
| 6 | leaves on the ground? |
| 7 | A I believe so. |
| 8 | Q Can you describe the road you were traveling on; |
| 9 | that is, Harrison Street, as to how wide it was? |
| 10 | A Approximately three lanes wide. |
| 11 | Q You have been back to the scene of the |
| 12 | accident recently, have you? |
| 13 | A Yes, I have. |
| 14 | Q So that also refreshed your recollection that the |
| 15 | street is three lanes wide. Is that right? |
| 16 | A Yes. |
| 17 | Q Which side of the street were you driving |
| 18 | on as you approach the intersection? |
| 19 | A I was on the right side of the street, |
| 20 | approximately four feet, four or five feet from the curb. |
| 21 | Q Four or five feet from the curb? |
| 22 | A Yes. |
| 23 | Q The right curb? |
| 24 | A Right curb. |
| 25 | Q Were there any cars in the right lane at the time? |

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street?

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A No, there were not.

THE COURT: Did you put your brake on when you hit this corner then?

THE WITNESS: I didn't realize I was in an intersection at that time at all. Due to the weather conditions it looked like one continuous street.

THE COURT: You thought it was a continuous

THE WITNESS: Yes.

THE COURT: It was so bad you just kept on driving in the rain, in the dark, without being able to see a street? I don't understand it.

I'd like the witness to answer.

THE WITNESS: The appearance of the street looked like it was one solid street without an intersection at all.

MR. GRAHAM: I am having trouble hearing.

THE WITNESS: The appearance of the intersection looked like there was one solid street, like there were no intersections or side streets coming into it.

Q Were there any street lights and did you see them on at the time?

A Not that I noticed.

Q Did you happen to see any lines in the road?

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24 25 Were there any dividing lines or other lines of any sort?

No dividing lines.

Did you see any lines at all?

No, I didn't.

Do you happen to recall, now that you have been Q back, that that store that is on the right side of Harrison, as you approached the intersection, do you recall that there is a little store there?

Yes, there is.

The pictures speak for themselves. Q

THE COURT: In other words, you thought you were still continuing on Harrison Street without knowing there was a cross street. Is that it?

THE WITNESS: Yes, sir.

THE COURT: That's why you didn't put your brake on?

THE WITNESS: That's right.

THE COURT: But you were really cutting across traffic, weren't you?

THE WITNESS: Yes, sir.

From your recollection and after reviewing those pictures, at what point on Harrison would you have to travel before you could see the traffic coming on Bement?

You would have to travel relatively quite a

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Q You did testify you just returned. Are those signs stil. there, to the best of your knowledge?

A To the best of my knowledge those signs are still

there.

THE COURT: Was there any reason why you couldn't see the stop sign?

THE WITNESS: Apparently at the time they were blocked by three no parking signs.

MR. GRAHAM: I object to the answer to that question. He appears to be giving a hypothetical answer.

THE COURT: All right, I won't take it. You develop it yourself.

Q At the time of the accident you did not see the stop sign. Is that correct?

A At the time of the accident, no.

THE COURT: I would ask him simply because of darkness or any other reason, if he knows.

Q Do you recall now why you might not have seen the stop sign at that time?

A Yes.

MR. GRAHAM: Objection. I think it's very material and relevant, your Honor, as to on the date of the occurrence.

THE COURT: We are talking about the date of the occurrence. We are talking about that.

MR. GRAHAM: He said when he revisited the scene.

MR. YOUNG: If I did I correct myself.

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At the time of the accident do you recall now why you might not have seen the signs?

while an ideal street water was a little of

Yes. It was because of the three no parking signs that were on the pole in front of the stop sign.

- In addition to the weather conditions?
- Yes.

MR. YOUNG: May I have a moment to confer?

THE COURT: Yes.

You testified you were recently back to view the scene of the accident. In walking down Harrison, that is Q west on Harrison, in the same direction you were traveling, can you recall approximately at what point prior to reaching the stop sign you could actually see the stop sign?

MR. GRAHAM: Object to the form of the question. Hypothetical in form.

THE COURT: Overruled.

- Repeat the question, please.
- The question is simply this: At what point coming west on Harrison do you, having recently been back to the scene of the accident, would you estimate you could see the sign, how far away from the stop sign is it? Is it before you reach the stop sign that you can actually see it, if you can see it at all?

THE COURT: Let me put it the other way, that

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might be easier: How far is the traffic sign, so-called, from the stop sign?

THE WITNESS: Approximately 16 feet, I guess.

THE COURT: 16 feet?

THE WITNESS: 16 feet, roughly.

THE COURT: Would you have to pass the traffic sign before you could see the stop sign?

THE WITNESS: I would say so, yes.

THE COURT: So that would mean you would have to be within 16 feet of the stop sign before you saw it.

THE WITNESS: Yes, sir.

- Q If you were 100 feet from the stop sign would you be able to see the stop sign from essentially the angle or the position that your car was driving at the time?
 - A I would say it would be obscured.
 - Q It would be obscured?
 - A Yes.
- Q In other words, you were close enough to the curb, you even went back further or back so that you could not see the stop sign, you were not close enough to the curb.

A Yes.

THE COURT: Could you stop in 16 feet if you were going 15 miles an hour, if you know?

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THE WITNESS: I don't know. I can't really answer that because I never tested that.

MR. YOUNG: I have no further questions.

CROSS EXAMINATION

BY MR. DONOGHUE:

- Mr. Lusardi, how fast were you going at the Q time of the accident?
 - Approximately 15 miles an hour, sir.
- Is it your testimony that there were leaves on the ground at that time, that the ground was generally wet?
 - I believe so.
- How far were you from the curb on your right-hand side as you proceeded down that road?
 - Approximately four, five foot. A
 - Fairly close to the curb then? Q
 - Yes.
- I show you a copy of Defendant's I in evidence, which is a photograph of the intersection at which the accident took place. Now, as you reached that intersection do you recall whether or not the lights were on in that store on the right?
 - I don't recall.
 - Do you recall whether there were any street

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lights on at all?

A No, I don't, sir.

Q The photograph in evidence shows a car parked, extending somewhere out from Bement Street facing toward Harrison. Were there vehicles parked in a similar manner that night?

- A There may have been, I don't recall.
- Q Did you observe any?

A I don't recall looking up Bement Street at that particular moment. There were vehicles on Harrison Street, on the left-hand, extreme left-hand side.

Q Now, you testified that as you drove down

Harrison you had the impression that you were going down
a solid street with no intersection.

A Yes, sir.

Q Did you see the store as you approached that intersection?

A I don't really recall if I saw a store or not.

Q Didyou see the signs as you approached that intersection, any signs at all?

A Just prior to the intersection there was a blinking light and a stop sign which leads on to Harrison Street itself.

Q Did you look to the right and left before you

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reached the intersection?

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THE COURT: I don't hear a word of this.

What did you think?

THE WITNESS: Just prior or just before, the block before this there was a stop sign.

THE COURT: A block before, all right.

Q When you reached the intersection of Bement and Harrison did you see any lights at all to your right?

A Just that of Mr. Cordaro's vehicle.

Q How soon before you reached the intersection did you see that?

A I believe I was just approaching the intersection or in the intersection at that time.

Q Okay.

THE COURT: When you crossed into the intersection you must have looked into the left to see whether any car was coming down that could hit you going north. Is that right?

THE WITNESS: Was glancing back and forth to the right and left.

THE COURT: If you glanced to the right you didn't see the beam of any light?

THE WITNESS: The only time I caught the beam of light is when the vehicle was off to the right, I realized

there was an intersection.

THE COURT: Well, I guess if you didn't realize there was an intersection you wouldn't be looking to the left or right, you would be looking straight ahead?

THE WITNESS: I didn't realize there was an intersection but just force of habit to look in both directions really.

THE COURT: If you were in the middle of the street between two rows of houses, you wouldn't be looking left or right; you would be looking ahead of you, wouldn't you?

THE WITNESS: Basically, yes.

THE COURT: So the answer is not knowing there was an avenue there or a street and not having seen the stop sign, you just went ahead at the same rate of speed as you had been doing during the block preceding. Is that right?

THE WITNESS: Yes, sir.

Q Mr. Lucardi, I show you colored photograph-THE CLERK: Plaintiff's Exhibit 2 for
identification.

(Plaintiff's Exhibit 2 marked for identification.)

Q I ask you if you have ever seen that vehicle before.

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A If this is the Cordaro vehicle, it's the one that was involved in the accident.

Q Was that the condition in which it was after the accident, to the best of your knowledge?

A To the best of my recollection that's probably what it was.

THE COURT: Whose vehicle was this?

MR. DONOGHUE: This is Mr. Cordaro's car immediately after the accident, your Honor.

I offer it in evidence.

THE COURT: All right, received in evidence.

(Plaintiff's Exhibit 2 received in evidence.)

Q Mr. Lusardi, after the accident did you have a conversation with Mr. Cordaro?

A Yes.

Q Do you recall whether you mentioned anything to him during that conversation about the intersection or the stop sign?

A No, I don't. The only recollection I have of the conversation was asking him if he was okay and then proceeding to check to see if the police were called.

THE COURT: Did you call the police?

THE WITNESS: No, I didn't. Apparently one of the bystanders or the people that were there did.

Q After the impact did you move your car over to the side of the road before you got out of it?

A No. I didn't.

Q You left it where it was at the point of the impact?

A Yes.

MR. DONOGHUE: No further questions.

CROSS EXAMINATION

BY MR. GRAHAM:

Now, Mr. Lusardi, on the day of the accident,
prior to the accident as you were proceeding down
Harrison Street, what, if anything, did you observe prior
to observing the beam of light you testified was
approximately 45 degrees to your right?

A The road conditions, I guess, the appearance--

Q What else did you observe other than the road condition, if anything?

A It seemed to be a clear street or a straight street, very little traffic on it. Just those vehicles that were parked on the extreme left-hand side.

Q Isn't the truth of the matter, Mr. Lusardi, that you didn't see any signs on Harrison Street from the time you got on it until after the point of impact between your vehicle and the vehicle of the plaintiff.

Isn't that correct? 2

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Well, yes or no?

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That may be.

I don't quite understand the question.

Did you observe any signs as you were going down Harrison Street on the right side immediately prior to the point of impact? Did you see any signs?

I didn't notice any.

None at all from the time you got on Harrison Street until after the accident did you see a sign. Isn't that correct?.

Not the two signs that are in question.

THE COURT: The question is how many blocks did you go on Harrison Street would you say before the point of accident?

THE WITNESS: Just one block.

THE COURT: Just one block, you had turned into

it?

THE WITNESS: Right.

THE COURT: You had seen no signs at all on

Harrison Street?

THE WITNESS: No, sir.

Is it or is it not correct, Mr. Lusardi, Q that this business about the pole with the three signs

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on it, that business came up after the accident. Is that correct?

THE WITNESS: Yes.

Q Isn't it also correct that you returned to the scene of the accident with one of your superiors?

Is that correct?

A Yes.

Q And, Mr. Lusardi, isn't it also correct that your basic job is one of a guard. Isn't that true?

A Yes.

Q And your primary function is security surveillance as to the Vanderbilt and the other mansion in Hyde Park?

Is that correct?

A Yes.

Q It's not normal for you to be making trips through the City of Poughkeepsie to pick up maps, is that correct?

It's not a normal part of your position?

A It's part of the job description or part of the standing--

Q How many times had you been there to pick up a map or maps before the date of the accident?

A This is the first time, sir.

Q The first time. So when you say it was part of your position, you are talking about a job specification.

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Is that correct?

A This was an assignment which was customarily given the Protection Division generally. We generally took care of requests in relation to the job to certain incidents.

Q You hadn't been sent on a mission like that before, had you?

A Not to the Highway Department but to other areas.

THE COURT: Who asked you to go this time to get
the maps?

THE WITNESS: The Superintendent.

THE COURT: The Superintendent of the park?
THE WITNESS: Right, your Honor.

Q Incidentally, you have both a federal license and a state license, is that correct, to operate a motor vehicle?

A Yes.

Q How long have you had a license to operate a motor vehicle in the State of New York?

A Since 1966--1963.

Q How long have you had a federal license to operate a federal vehicle?

A When I started working with the Park Service.

Q Was that at about the same time?

A '66 roughly.

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Q And throughout your tenure with the Park Service you have been in the Hyde Park vicinity. Is that correct?

A Yes.

Q And it's further correct that your home is not in Dutchess County, the place where Hyde Park and Poughkeepsie are located.

A Yes, sir.

Q And you are not familiar with the streets in the City of Poughkeepsie.

A Basically, no.

Q Now, would you please explain to the Court in your own words how you missed seeing the stop sign, in your own words.

A I was driving down the street of Harrison

Street, west. The weather conditions partially plus the stop sign, did not cast-- it was a non-reflective stop sign--

Q I will move to strike your answer since you didn't testify to that on direct examination. But tell me why you didn't see it.

A Because I believe it was obscured by the parking signs.

Q You never saw the sign obstructing it, though, did you, prior to the time of the accident?

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A I could not see beyond that:

Q What obstructed your view of the sign, the pole having the three signs on it, if anything?

A I don't know.

Q You have been back to the scene of the accident, haven't you?

A Yes.

Q More than once, haven't you?

THE COURT: What does it say on the signs in front of the stop sign?

THE WITNESS: I didn't take notice of it. It
just said no parking between such and such hours and alternate
street parking, to that effect.

Q Isn't it true that when you came up with this explanation it was after you went back with one of your superiors to the scene of the accident. Isn't that true, Mr. Lusardi?

A Yes.

Q And how much time elapsed from the time of the accident until the time you went back with one of your superiors?

A My superior met me at the police station and they had said, words to the effect, "Let's go back and see what was the reason why you went through the stop sign."

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Q Incidentally, did somebody ask you prior to returning to the scene of the accident why you didn't see the sop sign?

A I don't recall.

Q Well, did you wonder, prior to the leaving the scene of the accident, as to why you didn't see the stop sign?

- A Yes, I did.
- Q What did you do about that inquiry?

A At that particular moment, nothing, because I was somewhat shaken up and I was with the police officer at the time.

Q You had an opportunity to go back and look, didn't you?

A No, the opportunity might have been there but

I didn't realize it or recognize it at the moment.

Q It's now your testimony under oath that the reason you didn't see him was because of an intervening sign.

Isn't that true?

A Yes, it is.

Q Isn't it also true that you never saw the intervening sign on the night of the accident?

A I would say it didn't register, per se, as being a sign there.

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Q You just testified under oath that you never saw any signs. Didn't you just testify to that?

Didn't you testify to that, Mr. Lusardi, you didn't see any signs from the time you got on Harrison Street from the time you got on it until the time of the accident?

A None that registered in my head of being significant or important to stop or to yield or whatever.

Q That wasn't the answer you gave before, was it? You said you saw no signs, yes or no?

A Yes.

Now, why did you take a different return route to the place you had originally come from in Hyde Park?

A The reason was the traffic was backing up at that point on Main Street.

What point was that, Mr. Lusardi?

A It's, I believe, where White Street intersects
Main Street. It's several blocks away from the detoured
intersection.

Where is the detoured intersection?

A On Main Street.

Q Whereabouts on Main Street?

A I don't recall what the exact location is.

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MR. ROSENBERG: May I ask the witness be shown the map which he has previously identified as one that he marked indicating his route if further questions on this line are going to be pursued?

THE COURT: Yes.

MR. GRAHAM: All right.

(Handing to the witness.)

THE COURT: Let me ask you if you intended to make any stop-off anywhere other than go directly from the Highway Department to your station?

THE WITNESS: No, sir.

- Q At what point did you leave Main Street as you returned? At what point, what street did you get off at?
 - A White Street.
- Q When you came down--by "down" meaning coming to that facility in the town of Poughkeepsie--at what point did you get on Main Street? You came down on Route 9G.

 Is that correct?

A Down 9G and then I either came down North Hamilton Street or North Clinton Street, which intersect Main Street

Now, would I be true in saying that you got off
Main Street as you were returning from your mission some
distance prior to the detour. Isn't that correct, Mr. Lusardi?

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A That's approximately three blocks away, yes.

Q Is it your testimony that the intersection of Main Street with North White Street is three blocks away from North Clinton Street. Is that your testimony?

A Pardon?

Q Is it your testimony that it's three blocks away from where you got on to Main Street the first time around?

A I don't follow it.

THE COURT: I don't follow it either. Try it again, Mr. Graham.

Q Explain to me briefly, Mr. Lusardi, why you left Main Street at North White Street as opposed to closer to the original route you took in the first place?

A Because traffic was backing up at that
particular intersection and I recollected that within
that area there was detoured sections because of the fire
the previous night.

Q Do you know of your own knowledge there was a fire the previous night?

- A Yes, sir.
- Q Did you see the fire?
- A No, but I heard of the news accounts on radio.
- Q Now, as you were proceeding back on Main Street

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before you got off on White Street, what were the traffic conditions?

- A Proceeding back from the Highway Department?
- Q Yes, on Main Street.
- A Well, medium I'd say.
- Q Am I correct then in saying that traffic had not started to back up when you left Main Street. Would that be correct?

MR. ROSENBERG: I object. I don't see the relevance of this line of inquiry at all.

THE COURT: I don't know where it gets you because unless you can sort of establish that he had some goal or other purpose, going down one street or another is not meaningful.

- Q Isn't it so that you didn't know where you were when the accident took place?
 - A That's true.
- Q In fact you were just guessing how to get there by this detour route that you hoped would take you to a certain place. Is that correct?
 - A Yes, sir.
- Q Now, when you first observed the lights on the Cordaro vehicle, what conclusion, if any, did you make?

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A That there was an intersection there and a vehicle was coming at my vehicle.

Q And what did you do immediately when you made that conclusion?

A I believe I took my foot off the accelerator and applied the brakes and tried to swerve to the left.

Q Now, would you explain how it's possible, to the best of your recollection, for the angle of the lights to be 45 degrees from where you were?

A It wasn't the lights per se but the beam of light or the light that was cast from the vehicle itself.

Q Is it your testimony then that you don't know exactly where the car was located but that the beam of light was 45 degrees? Is that your testimony?

A What I am saying is I first observed a light ray or beam of light at approximately 45 degrees from the position of where I was at.

Q And where exactly were you at that position to the best of your recollection?

A In what relationship?

Q Anything you can relate it to, the stop sign or anything that's in that vicinity because you had difficulty before explaining whether or not you were in the intersection.

Do you know whether or not you were in the intersection when

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you first saw the lights?

A To the best of my recollection I don't know whether I was exactly in or just prior to the intersection.

Q Was it your intention in driving down

Harrison Street to take your first right in a northbound

direction, was that your intention upon coming to an

intersection, to take you back to the route you had come

down, 9G?

A My intention was to make a right turn off

Main Street to avoid the traffic and take the first left turn

and follow that in a due westerly course.

O To where?

A To get back to either 9G or U.S.9, where I could proceed back to the Vanderbilt Estate.

THE COURT: But you were proceeding in a westerly direction when the accident happened, weren't you?

THE WITNESS: Yes.

THE COURT: If you kept on straight you would hit 9G, wouldn't you?

THE WITNESS: That's what I assumed.

Q But you concluded that the road being Harrison

Street had all the appearances of not having an intersection.

Is that correct?

A That's correct.

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|---|---|---|---------|--|--|--|--|--|--|
| 2 | Q | Where did you anticipate that you would | connect | | | | | | |
| 3 | with Route | 9G or some other road? | | | | | | | |
| 4 | . A ' | I figured eventually it would have to o | ross | | | | | | |
| 5 | in a wester | ely direction since 9G and U.S.9 run nort | h and | | | | | | |
| 6 | south. If | you were heading in a westerly direction | you | | | | | | |
| 7 | would eventually cross. | | | | | | | | |
| 8 | Q | Were you in a rush to get back? | | | | | | | |
| 9 | A | No, I was not. | | | | | | | |
| 0 | Q | What kind of condition was the motor ve | hicle | | | | | | |
| 1 | you were operating at the time of the accident? | | | | | | | | |
| 2 | A | In good condition. | | | | | | | |
| 3 | . Q | How were the tires? | | | | | | | |
| 4 | A | Good. | | | | | | | |
| 5 | Q | How do you know that of your own knowle | dge? | | | | | | |
| 6 | A | The tires were just recently changed on | the | | | | | | |
| 7 | vehicle. The vehicle is inspected monthly by the park | | | | | | | | |
| 8 | maintenance. | | | | | | | | |
| 9 | Q | Had you driven that vehicle before? | | | | | | | |
| 9 | A | Yes, sir. | | | | | | | |
| 1 | Q | And how was your reaction time in terms | of | | | | | | |
| 2 | braking a m | otor vehicle? Do you know what I mean w | nen I | | | | | | |
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THE COURT: You don't mean what is your reaction time.

say reaction time?

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Q Would you classify your reaction time in terms of the time it takes you from observing certain conduct until the time it takes you to put your foot on the pedal of the brakes, would you classify your reaction time as fair, medium or good, if you know?

A I would say it was good.

Q You observed the car lights and did you in some way slow down your vehicle?

A Yes, sir.

Q Approximately how many feet did the motor

vehicle you were operating travel from the time you first

observed the car lights until the time of the point of impact?

A I have no recollection.

Q No knowledge?

A It would be just a mere guess at the most.

Q I don't want you to guess. More than one car length?

A I don't recall.

Q Did you have your car under control,

Mr. Lusardi?

A Yes, sir.

Q Then why weren't you able to stop and avoid the collision, if you know?

A Because I was in the intersection when the

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impact took place.

THE COURT: If you had stepped on the gas instead of putting your brake on could you have cleared his car do you think?

THE WITNESS: Maybe. I don't know, I don't know.

- Q I am sorry, I didn't hear your answer.
- A I don't really know.
- Q I show you Exhibit I in evidence. Now, you testified before there were three no parking signs.
 - A They are not three no parking signs.
- Q No. That photograph appears to have been taken from some point almost directly in front of the stop sign. Is that correct?
 - A I don't know.
- Q You have returned to the scene of the accident how many times, Mr. Lusardi?
 - A Twice.
- Q And at the time the accident took place, specifically a little bit prior to it as you were approaching the intersection, where on the roadway was your vehicle located approximately in connection with the center of the road?
 - A With the center of the road?

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Yes.

It was probably towards the center of the road itself or to the right of the center of the road.

Now, I show you this photograph and I would ask you two questions in connection with it. Now, from that photograph which is in evidence, can you make out the octagonal portions of the stop sign?

You can just barely see the S on this photograph.

But you know of your own knowledge and your familiarity in driving the State of New York that that's a stop sign without seeing all the letters on it, Mr. Lusardi?

A Yes.

Now, would you conclude by viewing that picture that the photographer who took that picture was not in the same position in his motor vehicle as you were as you approached that intersection. Would that be a correct characterization? He looks like he was almost perpendicular to the sign. Is that correct? Whereas you were somewhat in the middle of the road. Do you understand what I mean?

> A No, I don't understand what you are referring to.

Would you agree with this: Obviously looking straight at the sign as I am looking at you now --

THE COURT: From where, which side?

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Approaching from Harrison Street proceeding in a westerly direction, if you were standing on the sidewalk your view would be different than if you were driving a vehicle in approximately the middle of the road. Is that correct?

A If you were standing on the sidewalk, yes.

Q Well, approximately how many feet off the curb are the poles supporting the various signs?

A How many feet from the curb to the pole itself?

O Yes.

A I passed that off and the stop sign is approximately 20 some oci inches in.

THE COURT: What?

THE WITNESS: About 20 inches in and the no parking signs are about 18. They are closer to the curb.

Q As you returned to the scene of the accident twice--

MR. YOUNG: Excuse me. I didn't catch the answer of that. Would you repeat that?

THE WITNESS: The parking signs were approximately 18 inches away from the curb and the stop sign was approximately 20 inches or more.

THE COURT: You mean it was on the curb, on the sidewalk, is that it, 20 inches from the curb?

THE WITNESS: 20 inches to the pole itself.

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it?

THE COURT: You mean the pole was in the gutter or the pole was on the sidewalk?

THE WITNESS: Going in towards the sidewalk.

THECOURT: The pole is on the sidewalk?

THE WITNESS: Yes.

THE COURT: : We'll have to adjourn this case until 10:00 tomorrow morning then.

(Discussion off the record.)

THE COURT: All right, we will keep on with this case.

(Third-Party Exhibit K marked for identification.)

- Now, I show you that exhibit. Would you tell me what that shows to the best of your knowledge?
 - A That shows the stop sign and the ordinance signs.
- Q What does that show you about the stop sign that the previous exhibits do not, Mr. Lusardi?
- A Well, the vehicle was way over to what is the mid-center of the road.
- Q Obviously the photographer was in a different position when he took that picture than with the previous exhibit. Is that correct?
 - A The center of the picture, yes.
 - Q And one picture shows the stop sign clearly, doesn't

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A Yes.

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Q Have you ever had occasion to return to the scene of the accident under substantially the same conditions under those which took place during the time of the accident?

- A Yes.
- Q Yes?
- A As far as the weather conditions?
- Q Yes, the weather conditions, the lighting conditions and the road conditions.
 - A I was there Saturday.
 - Q Was it raining when you were there?
 - A No, it wasn't. It was a clear day.
 - Q Was it late in the afternoon?
 - A Approximately 4:00.
 - Q Approximately 4:00.

MR. GRAHAM: I would offer Third-Party's Exhibit K in evidence, your Honor.

MR. DONOGHUE: No objection.

(Third Party Defendant's Exhibit K received in evidence.)

Q Is it true that you have never in fact returned to the scene of the accident under similar conditions. Is that correct?

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A Not under rainy conditions.

Q The truth of the matter is you haven't even returned to the scene of the accident in night time hours where a condition of darkness might have taken place.

Is that correct?

A That is true.

Q Now, how long had it been raining that afternoon, if you know, prior to the time of the accident?

A I don't recollect the exact time. It was raining all afternoon, I guess.

Q An hour?

A Yes.

Q And from the time you left Hyde Park until the time you made your way to the intersections of Bement and Harrison, what is the maximum speed the motor vehicle you were in had attained, if you recall?

A Approximately 25 miles to 30 miles an hour or so.

Q Had you had occasion prior to the time of the accident when your vehicle was proceeding approximately 15 miles an hour to bring the vehicle to a stop?

A Pardon?

Q Did you have any occasion that afternoon while it was raining to bring your vehicle, or the vehicle you were

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operating, to a complete stop from a speed of approximately
15 miles an hour prior to the time of the accident?

A I don't really follow your questions.

THE COURT: Well, the answer is obvious.

Did you ever have to put your brake on and stop for a light or something else?

THE WITNESS: Surely, at all the required intersections.

Q Did you have to do that at any time when you were going at a speed of approximately 15 miles an hour?

A Yes, sir.

Q How long did it take you to stop? In terms of feet or car lengths or something along that line.

A I wouldn't recall. I don't really know what the distance was.

Q Do you recall approximately?

A No, I don't.

Q Would it be correct to say you stopped a variety of times that afternoon under similar conditions?

A Yes.

Q But you don't recall how many feet or car lengths
your vehicle would travel to come to a stop?

A Depending on the amount of vehicle traffic in front of me.

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Q Prior to the time of the accident and that afternoon, based on the reaction to the car stopping on wet pavement, how did it stop, fast, slow, abruptly? Classify it for me.

A I would say that the vehicle itself handled under normal conditions was -it showed no adverse effects.

Q It reacted promptly to your stepping on the brakes?

A Right.

The vehicle had an automatic transmission?

A Yes.

O Power brakes or regular brakes?

A I don't recall now.

Q Had you driven the vehicle prior to the date of the accident?

A Yes, sir.

Q And you had driven the webicle after the date of the accident?

A Yes.

THE COURT: When you put the brake on after you were in the intersection did you skid at all?

THE WITNESS: I don't believe so.

Q Mr. Lusardi, what was the reaction of your superior or your superiors to the fact that you had been

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in an accident?

A There was an accident and the reports had to be made out.

- Q Beg pardon?
- A The reports had to be made out.
- Q Did they have any reaction to the fact that you had an accident to the best of your recollection?

MR. ROSENBERG: Objection.

THE COURT: Sustained.

Q For what reason, if you know, did one or more of your superiors accompany you upon your return to the scene of the accident?

MR. ROSENBERG: Objection.

THE COURT: Sustained.

- Q Approximately how long did it take you to get from Hyde Park to the place where you were to pick up the maps?
 - A Approximately 25, 30 minutes, I guess.
- Q And how many miles did you have to travel in that point of time?
 - A It's about nine miles.
- Q Do you recall a similar question to that being asked and you said 15 to 16 miles? Were you referring to the round-trip when you said 15 to 16 miles, do you recall

that?

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at this point.

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A I vaguely recall. I don't recall what the context of the question was.

MR. GRAHAM: No further questions of this witness, your Honor.

THE COURT: All right, 10:00 tomorrow morning.

MR. YOUNG: May we finish with this witness?

THE COURT: Well, my schedule is more important than his job at the moment.

MR. YOUNG: I have only two questions.

THE COURT: Do you have any questions?

MR. DONOGHUE: No, your Honor. I was going to request that this matter be put over to a day other than tomorrow if it's convenient to the Court.

THE COURT: Why?

MR. DONOGHUE: I would have to substitute another attorney to take this for me and I would prefer not to.

THE COURT: What other witness is there in this case? What other witness does the government have?

MR.YOUNG: The government has no other witness

THE COURT: Poughkeepsie?

MR. GRAHAM: I would think my testimony as to

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him would be 20 minutes.

THE COURT: Can't it be stipulated?

MR. GRAHAM: Some photographs and some

distances. Maybe we can work it out.

THE COURT: Stipulate it. You don't have a

jury here.

MR. ROSENBERG: We will stipulate to distances and authenticity of the photographs.

MR. DONOGHUE: And the distances.

MR. ROSENBERG: And the angular relationship to the signs.

THE COURT: That he would testify if called-write it out and give it to me.

You ask your two questions.

REDIRECT EXAMINATION

BY MR. YOUNG:

Q Mr. Lusardi, counsel for the third-party defendant just asked you what caused you to not see the parking signs. Do you mean that you looked and saw no signs or that you just don't recollect seeing any signs?

- A I didn't recollect seeing any signs.
- Q You weren't looking for parking signs?

 MR. GRAHAM: I will object. That's not within
 the scope of the questions he can ask.

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THE COURT: Don't get excited about it. He said it was dark, it was raining, he didn't see anything. He didn't know there was a corner.

MR. GRAHAM: He testified he was looking to his left and right as he proceeded.

THE COURT: I questioned when more closely and he said he couldn't have been looking to the right and left if he was in the middle of the block.

Q How much time do you estimate between the time you first saw the beams and the impact?

A A couple of seconds.

Q Did you have time to react, have time to think how you were going to react?

A It was almost an immediate reaction.

Q I show you these two exhibits, Defendant's Exhibit I and third-party defendant Exhibit K. Which of these pictures do you believe best represents the field of vision you had at the time?

A I.

Q That is the Defendant's Exhibit, the one-THE COURT: Never mind the one. That's why
we have letters on them so we can identify them.

MR. YOUNG: No further questions.

MR. GRAHAM: One additional point I would like

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to point out. There is a pending motion with regard to this case which had a return date of November 20th.

THE COURT: What do you want to do about it?

MR. GRAHAM: I would like to submit a brief and
to complete my work on it and have until the end of the
month, your Honor.

THE COURT: This is what I am going to do:-
MR. GRAHAM: I would like to offer in evidence
a certification of the charter law provision which is the
one that is relied upon.

THE COURT: I am going to give you until

November 30th to put in a brief on the liability of the

City of Poughkeepsie in relation to the signs. That's

what you are talking about, isn't it?

MR . GRAHAM: That's correct, Judge.

THE COURT: I am going to reserve decision on the merits and I am going to say that if I decide on the merits in favor of the plaintiff, then I will require further testimony from the defendant—from the plaintiff with respect to notice to the government within the two-year provision of the Torts Act. If I decide in favor of the defendant, then it wouldn't be necessary. So I will give you an interim interim decision on liability.

MR. ROSENBERG: Do you wish us to submit any

proposed findings?

THE COURT: I don't believe so. It's a very simple case. The only thing I want you to do is order the minutes because I have no money to order them. Then send them to me and I will look at them. We have no budget for that.

MR. ROSENBERG: The government has ordered the minutes.

THE COURT: The United States Attorney has a budget.

Attorney for convenience, if you don't mind, gentlemen.

When you submit the transcript from the reporter submit the exhibits as well.

Thank you very much.

(Court adjourned.)

| 1 | | WITNES | S INDEX | | | |
|-----|---------------------|--------|----------|----------|----------|----------|
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72.2807.

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

FRANCESCO CORDARO,

Plaintiff,

#40179

72 Civ. 3644 MIG

RICHARD H. LUSARDI and THE UNITED STATES OF AMERICA,

Defendants and Third-Party Plaintiffs, JAN 7 3 HA FH 77

CITY OF POUGHKEEPSIE,

Third-Party Defendant.

APPEARANCES

MARSHALL L. BREENER, Esq.
Attorney for Plaintiff
Poughkeepsie, New York
By: John Donoghue, Esq., of Counsel

PAUL J. CURRAN, United States Attorney
Southern District of New York
Attorney for Defendants and Third-Party Plaintiffs
By: Gerald A. Rosenberg
Dennison Young, Jr.
Assistant United States Attorneys
of Counsel

JEFFREY GRAHAM, Assistant Corporation Counsel Attorney for the City of Poughkeepsie

GURFEIN, D.J.:

This is an action for damages resulting from an automobile collision on November 7, 1969 in Poughkeepsie.

On a showing that defendant Lusardi, an employee of the National Park Service, Department of the Interior, was in the course of his employment at the time of the accident, I permitted the United States to be substituted as a defendant, but I refused to grant summary judgment on the alleged ground that the plaintiff had failed to file an administrative claim before he filed this action, 28 U.S.C. § 2675(a), within the period prescribed by law. 28 U.S.C. §2401(b). See Cordaro v. Lusardi, 354 F. Supp. 1147 (S.D.N.Y. 1973).

I also held that summary judgment could not be awarded on the basis of the release which had been executed.

The action has now been tried to the Court without a jury on the stipulated issue of liability only. Previously there had been inadequate proof of compliance with Section 2675(a), supra, but I stated that if I found liability, I would allow the plaintiff to reopen for proof that there was compliance. It was understood that if I found no liability, the issue of administrative claim would become irrelevant.

Findings

- 1. Plaintiff Francesco Cordaro struck a car as on he was proceeding/Bement Avenue in Poughkeepsie.
- 2. The car that he struck was operated by Richard Lusardi and was owned by the Department of the Interior of the United States.
- 3. Lusardi was at the time engaged in official duties.
- 4. There was a heavy rain at the time of the accident which was at about 4:45 P.M. on November 7, 1969.
- 5. The accident occurred at the intersection of Bement Avenue and Harrison Street.
- 6. The government car was in the intersection when it was struck by plaintiff who was driving south.
- 7. The car driven by Lusardi was coming from an easterly direction.
- 8. There was no stop sign on Bement Avenue before the intersection with Harrison Street, but there was a stop sign on Harrison before the intersection with Bement.
- 9. The plaintiff's car hit the defendant's car toward the rear door, i.e., in the center.
- 10. Plaintiff did not see defendant's car until just before he hit it. He could not stop his car in time.

11. There is a store on the northeast corner of
Bement and Harrison which obstructs the view of a driver
going south on Harrison.

12. Plaintiff knew this was a "blind" spot.

He had seen accidents at that intersection before.

13. He knew that a driver coming westerly on

13. He knew that a driver coming westerly on Harrison would have difficulty seeing accar coming south on Bement.

14. Plaintiff had picked his wife up, traversing the same route, every day.

- 15. Bement Avenue was about three lanes in width.
- 16. The defendant's car was more than halfway across Bement Avenue when plaintiff's car struck it.
- 17. Plaintiff's car hit the other car with the center front of plaintiff's car.
- 18. Lusardi had his windshield wipers on and was driving at about 15 miles per hour, with his lights at low beam.
- 19. Lusardi did not see the stop sign on the north side of Harrison before entering the intersection.
- 20. Lusardi could not see there was a cross-street and was proceeding at the same speed at which he had been travelling west on Harrison.

- 21. Driving down Harrison Street, which looked like a continuous street, Lusardi observed a beam of head lights to his right side at about a 45 degree angle.
- 22. Lusardi realized a vehicle was approaching from his right side and he applied his brakes and pulled to the left. At that point plaintiff's car stuck his car.
- 23. There is no explanation for Lusardi not seeing the stop sign other than the rainy weather and darkness or Lusardi's inattention.
- 24. Lusardi was negligent in not seeing the stop sign.
- 25. Plaintiff was negligent in failing to observe
 Lusardi's car coming into the intersection. He failed to
 look to the left, although he knew it was a dangerous
 intersection and that it was raining.

Conclusions of Law

- 1. The United States was negligent.
- 2. The plaintiff was contributorily negligent.
- 3. The law of New York governs in Federal Tort Claims Acts suits, 28 U.S.C. §2674.

4. The plaintiff may not recover, since in New York the contributory negligence of the plaintiff is a complete defanse.

5. The verdict is for the defendant United States.

January 7, 1974

1/1/19/1/19/1/19/10-

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

FRANCESCO CORDARO,

Plaintiff,

against

UNITED STATES OF AMERICA,

STIPULATION OF EXHIBITS INTO EVIDENCE

Defendant.

72 CIV. 3644 MIG

UNITED STATES OF AMERICA,

Third-Party Plaintiff,

against

CITY OF POUGHKEEPSIE,

Third-Party Defendant.

IT IS HEREBY STIPULATED by and between the attorneys for the respective parties herein that the attached exhibits be and the same hereby are stipulated into evidence, offered by third-party defendant, City of Poughkeepsie, as Exhibit M, Exhibit N, Exhibit O, and Exhibit P, as follows:

Exhibit M is a diagram not drawn to scale made by Richard Clifford accurately depicting the accident scene with regard to dimensions, but not being drawn to scale.

Exhibit N, Exhibit O, and Exhibit P are all true and accurate photographs taken in the vicinity of the accident looking towards the intersection of Harrison Street and Bement Avenue all taken from an elevation of five feet five inches from the street surface of Harrison Street, twelve feet from

Street the following distances from the tracing line, the said tracing line being that point where the most easterly curb line of Bement Avenue and the most waskerry line line of Harrison Street would have intersected some twelve feet into the intersection of Harrison Street and Bement Avenue at right angles where the southerly point of Bement Avenue intersects with the westerly tracing line of Harrison Street perpendicular thereto:

Exhibit N--a snapshot-sized photograph taken 195 feet away;

Exhibit O--a snapshot-sized photograph taken 56 feet away;

Exhibit P--an enlargement taken 114 feet away.

UNITED STATES ATTORNEY

Gerald A. Rosenberg
Attorney for United States of America

ROBERT B. DIETZ, CORPORATION COUNSEL OF THE CITY OF POUGHKEEPSIE

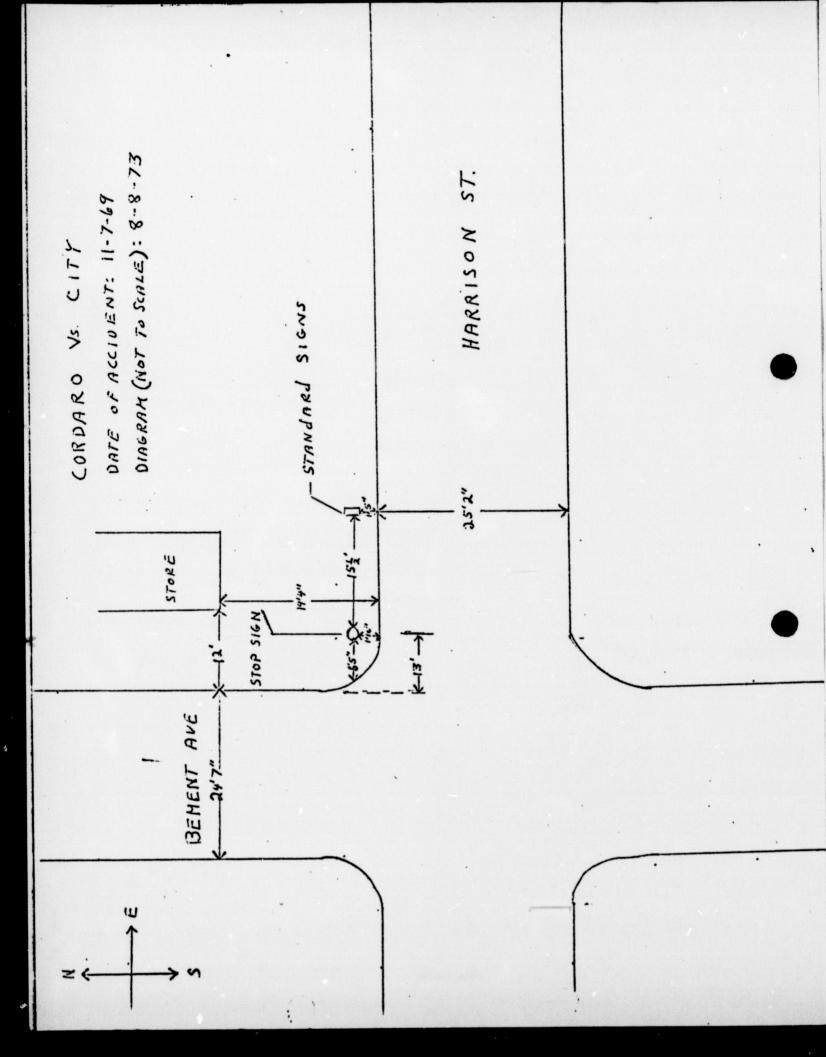
By Graham, Assistant Corpora-

tion Coursel, Attorney for City of

Poughkeeps/le

MARSHALL L. BRENNER

John Donoghue of Counsel



UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

FRANCESCO COT IARO,

Plaintiff,

-against-

RICHARD H. LUSARDI and THE UNITED STATES OF AMERICA,

STIPULATION DESIGNATING EXHIBITS

Defendants and Third-Party Plaintiffs,

72 Civ. 3644 MIG

-against-

CITY OF POUGHKEEPSIE,

Third-Party Defendant.

-----x

IT IS HEREBY STIPULATED by and between the attorneys for the respective parties herein that the following Exhibits presented into evidence during the trial of the above matter on November 13, 1973 before the Honorable Murray I. Gurfein be deemed designated to be part of the Record on Appeal:

Plaintiff's:

No.

Description

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Photograph of damage to plaintiff's car.

Defendant's:

Letter

Description

A

Release of claims, dated March 24, 1971, signed by plaintiff.

B

Copy of claim form (Standard Form 95) dated March 21, 1971, with a dated of receipt of the Department of Interior July 17, 1972.

Defendant's: Description Letter Copy of letter signed by C Marshall L. Brenner, dated March 25, 1971, addressed to United States Department of Interior Copy of letter signed by William W. Redmond, Regional Solicitor of the D Department of Interior, dated April 1, 1971, addressed to Marshall L. Brenner Copy of letter signed by Marshall Brenner (by Chester H. Gordon) dated July 14, E 1972, addressed to the United States Department of Interior F (marked for Copy of letter signed by William H. Thornton, Jr., Acting Regional Solicitor of the Department of Interior dated July 17, 1972, addressed to Marshall L. Brenner indentification) Copy of letter signed by G Marshall L. Brenner dated April 9, 1971, addressed to the United States Department of Interior "Official Arrow Map" of H Poughkeepsie and Dutchess County depicting route traveled by the United States Government driver. Photograph showing stop sign I obscured by parking signs. Photograph showing location J of corner grocerty store. Third Party Defendant's: Photograph showing stop sign unobscured by parking signs. K Certification of Section 200 of the Charter Laws of the City of Poughkeepsie Paul J. Curran, United States Attorney for

the Southern District of New York by

Assistant United States Attn.

4.00

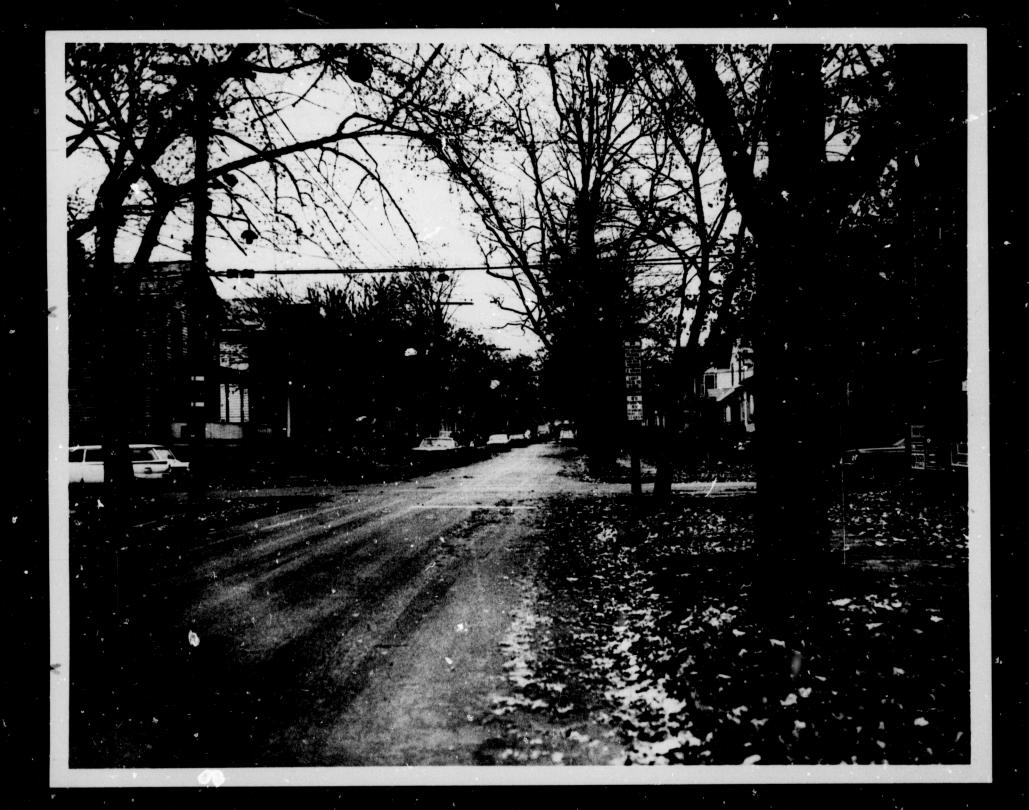
GERALD A. ROSENBERG

Robert D. Dietz, Corporation Counsel of the City of Poughkeepsie by:

JEFFORT'S GRAHAM, ESQ.
Assistant Corporation Counsel

Marshall L. Brenner By:

MARSHALL L. BRENNER, ESQ.



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